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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No

HUGO A. PINELL, JOHN L. SPAIN, LUIS N. TALAMANTEZ, WILLIE TATE, DAVID JOHNSON, and FLEETA DRUMGO,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the
State of California

The petitioners, Hugo A. Pinell, John L. Spain, Luis N. Talamantez, Willie Tate, David Johnson, and Fleeta Drumgo, pray that a writ of certiorari issue to review the decision of the Court of Appeal of California for the First Appellate District rendered in this cause on December 3, 1974.

OPINIONS BELOW

The decision of the Court of Appeal of California (Appendix A) is reported at 43 Cal.App.3d 627, 117 Cal.Rptr. 913. The decision of the Superior Court of Marin County (Appendix B) is unreported.

JURISDICTION

The decision of the Court of Appeal of California was entered on December 3, 1974. A timely petition for rehearing (Appendix D) was denied on January 2, 1975. A timely petition for hearing in the Supreme Court of California (Appendix C) was denied on January 29, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. sec. 1257(3).

QUESTIONS PRESENTED

The trial court below quashed the indictment against petitioners and held that the grand jury which indicted them was not selected from a fair cross-section of the community, in that, the selection process impermissibly discriminated against four identifiable groups in the community.

The California Court of Appeal reversed, holding that even though one such group was totally excluded as a class and others were systematically and substantially underrepresented, the grand jury selectors were not shown to have "purposefully" discriminated against such groups.

The questions thereby arising are:

1. Whether the findings of the trial court that petitioners had been indicted by a grand jury which was not in fact selected from a representative cross-section of the community, in violation of the Fourteenth Amendment, may be disregarded by the California Court of Appeal and the indictment against them reinstated on the basis of the latter court's conclusion that the grand jury selectors had no conscious purpose to discriminate.

2. Whether petitioners have established discrimination in the selection of the grand jury which indicted them where the grand jury selectors systematically and totally excluded "Latin Americans," a "distinct class" in the community, by making no affirmative effort to familiarize themselves with, or select, qualified potential grand jurors from this class.

3. Whether petitioners' Fourteenth Amendment rights were violated where the grand jury selectors disguised, through statistical overrepresentation, their failure to make any effort to familiarize themselves with the eligible black population of the county as a whole and instead selected only Blacks with whom they were personally acquainted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *United States Constitution,* Amendment XIV, Section 1:

> "... (N)or shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code Section 888.2 (in pertinent part):

"As used in this title as applied to a grand jury, 'required number' means . . . 19 in . . . counties [having a population not exceeding four million]."

California Penal Code Section 893:[1]

"A person is competent to act as a grand juror only if he possesses the qualifications prescribed by Section 198 of the Code of Civil Procedure.

A person is not competent to act as a grand juror if any of the following apply:

(a) The person is serving as a trial juror in any court of this state.

(b) The person has been discharged as a grand juror in any court of this state within a year.

(c) The person has been convicted of malfeasance in office or any felony or other high crime.

(d) The person is serving as an elected public officer."

California Code of Civil Procedure Section 198:[2]

"A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

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[1]Amended since the date of the indictment in the above-entitled case.

[2]Since amended.

2. In possession of his natural faculties and of ordinary intelligence and not decrepit;

3. Possessed of sufficient knowledge of the English language."

California Penal Code Section 895:[3]

"During January in each year the superior court of each county shall make an order designating the estimated number of grand jurors that will, in the opinion of the court, be required for the transaction of the business of the court during the ensuing year."

California Penal Code Section 896 (in pertinent part):[4]

"Immediately after such order is made, the court shall select and list the grand jurors required by the order to serve as grand jurors in the superior court during the ensuing year, or until new lists of grand jurors are provided. The selections and listings shall be made of men and women suitable and competent to serve as jurors, pursuant to Sections 897, . . . and 899. The list of persons so selected shall at once be placed in the possession of the county clerk."

California Penal Code Section 897:[5]

"The selections and listings shall be made of persons suitable and competent to serve as jurors, and in making such selections there shall be taken only the names of persons who are not exempt from serving, who are in the possession of their

[3]Since amended.
[4]Since amended.
[5]Since repealed.

natural faculties, who are not infirm or decrepit, who are of fair character and approved integrity, and who are of sound judgment."

California Penal Code Section 899 (in pertinent part):

"The names for the grand jury list shall be selected from the different wards, judicial districts, or supervisorial districts of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making the lists. The grand jury list shall be kept separate and distinct from the trial jury list. . . ."

California Penal Code Section 900 (in pertinent part):[6]

". . . [The county clerk] shall . . . deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box to be called the 'grand jury box.' "

California Penal Code Section 901:

"The persons whose names are so returned shall be known as regular jurors, and shall serve for one year and until other persons are selected and returned."

California Penal Code Section 902 (in pertinent part):[7]

"The names of persons drawn for grand jurors shall be drawn from the 'grand jury box.' . . ."

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[6]Since amended.

[7]Since amended.

California Penal Code Section 904:[8]

"Every superior court, whenever in its opinion the public interest so requires, shall make and file with the county clerk an order directing a grand jury to be drawn. Such order shall designate the number of grand jurors to be drawn, which shall not be . . . less than 25 nor more than 30 in . . . counties [having a population not exceeding four million]."

California Penal Code Section 905:

"In all counties there shall be at least one grand jury drawn and impaneled in each year."

STATEMENT OF THE CASE

Petitioners are four Black and two Latin American men, all of whom were, at the time of the indictment challenged herein, inmates at California State Prison, San Quentin. Five of them still remain in custody at that institution.

Petitioners were indicted by the 1971 Marin County (California) grand jury on October 1, 1971 and charged variously with conspiracy, murder and assault.

On September 14, 1973, petitioners moved to set aside the indictment on the ground, *inter alia,* that the grand jury selection process systematically excluded or substantially underrepresented determinable segments of the county population.

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[8]Since amended.

In support of this motion, an extended evidentiary hearing was conducted, encompassing sixteen court days and nearly two thousand pages of reported testimony (see generally, R.T.* 833-2771).

There was no significant conflict in the evidence concerning the manner in which the 1971 grand jury was selected. That grand jury was the first to be empaneled after the Marin County Superior Court judges instituted a change in their system for choosing the thirty selectees for the body.[9] Before 1971, the five judges themselves had made virtually all nominations to the grand jury (R.T. 1385). Several judges noted that there was justified criticism of the resulting body as being unrepresentative, with the grand juries being dominated by "the 'courthouse gang,' the Fourth Street, San Rafael, gang, 'or establishment,' whatever you want to use. . . ." (R.T. 1134-35; 1027-28; 1122; 1202).

In 1971, the judge-selectors attempted to broaden the sources of grand jury nominees. The presiding judge wrote to 79 organizations from a list submitted by the Marin Council for Civic Affairs (MCCA), asking each organization to recommend potential grand jurors (R.T. 1124; 926).

An expert witness, a sociologist, testified that studies of organizations show that the higher one ascends the socio-economic scale, the greater the tendency to join organizations (R.T. 1652). He concluded that only a special effort to find working class organizations (an

*Reporter's Transcript.

[9]*See* CAL. PEN. CODE § 904, *supra*.

effort not undertaken by the judges) would be able to produce a cross-section of the population from organizational sources (R.T. 1653). His examination of the MCAA list indeed showed that all but two of the 79 groups were probably composed mainly of middle class, or upper middle class, people (R.T. 1651-56). Homeowner and business organizations predominated (R.T. 1654-55). There were no ethnic organizations on the list (Exhibit 26).

These organizational sources submitted approximately 75 names, which were supplemented by approximately thirty more, consisting of the judges' own nominees, people recommended by the judges' acquaintances, and two or three volunteers (R.T. 947; 1365-66; Exs. 1; 20; 22).

Questionnaires were sent to each of the resulting 105, and the responses were used in the further selection process (R.T. 973-74). On a consensus basis, the judges reduced the 105 names to the thirty placed in the jury wheel for the random drawing of nineteen (R.T. 956; 1159-63).[10] Some of the judges may have tried to find more Blacks and working people before the process reached this stage, but they testified there were problems getting people willing to serve because they could not afford the time (R.T. 954-55; 1062-64).

Since the judges conceded that their system of handpicking grand juries had not selected jurors from a cross-section in the past, statistics on the nominees and potential nominees were limited to 1971, the year the judges implemented the new system of soliciting names

[10]Pursuant to CAL. PEN. CODE §§ 888.2, 902, see *supra*.

of potential nominees from the recommended organizations.

The evidence showed that the thirty nominees consistently reflected the composition of the Marin County bench more than that of the general population: income, education, occupational status, age, and length of residence were significantly higher than that of the population generally (Ex. 22). There were no Latin Americans, the judges being unaware of the existence of Marin County's Latin American community (R.T. 1047-48; 1167-68; 1249; 1367). The only working class person on the final thirty, a bus driver, was included on the panel when a questionnaire was mistakenly sent to him instead of to its intended recipient, a former Novato mayor of the same name (R.T. 1595). The judges nominated two Blacks of their acquaintance (1275-76; 1379; 1425-26), but, as one judge testified, these upper middle-class people had nothing in common with the depressed community which contained 90% of the county's Blacks (Ex. E; Exs. 33, 34; R.T. 1426). Indeed, the selectors made no effort to choose jurors from this community (R.T. 1426).

Specifically, in addition to the total exclusion of Latin Americans, the evidence showed the following data concerning the substantial underrepresentation of two other groups found by the trial court to be identifiable in Marin County: the blue collar working class[11] and young people under thirty.

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[11]Both the defense and prosecution sociologists testified that blue collar workers can generally be defined as those who work as craftsmen, foremen, skilled workers, operatives, semi-skilled workers, laborers, service workers, and farm workers; and that white collar

Eleven of the 105 original nominees and one[12] of the thirty final nominees were known to be blue collar workers. (The occupation of one of the original 105 was unknown.) Three of the original nominees and one of the final nominees were under the age of thirty (Exs. 22; 23; 24).

Dr. Peter W. Sperlich, an expert in the use of statistical probability theory, testifying for the defense, analyzed these figures to determine whether these results could occur in an unbiased selection process. Assuming that the unknown occupation was blue collar, he calculated that the likelihood of blue collar occupations being as underrepresented as they were, in an unbiased system, would be:

(a) three chances in ten quadrillion for the 105 original nominees; and

(b) five chances in one hundred million for the thirty final nominees. (Ex. 30; R.T. 1777).

Dr. Sperlich concluded that the low probabilities were statistically significant and demonstrated that there was bias in the selection process (R.T. 1777; 1781). The defense requested the prosecution statistician to recalculate these incredibly low probabilities, but he was unable to find the time to do so (R.T. 2198; 2489).

Dr. Sperlich similarly calculated the probabilities regarding the selection of young people, with the following results:

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workers generally are those persons in professional, technical, managerial, administrative, sales and clerical occupations (R.T. 1667-68; 2070).

[12]The aforementioned bus driver, see *supra*.

(a) an unbiased system would draw a panel with the composition of the 105 original nominees one time in ten million;

(b) for the thirty final nominees, the figure was six in one thousand. (Ex. 30; R.T. 1775).

He again found these figures to be statistically significant (R.T. 1776). The prosecution statistician, ignoring the astronomical figures with respect to the 105 nominees, recomputed the above probabilities only for the thirty finalists. Nevertheless, he, too, found statistical significance and, therefore, bias in the selection process (R.T. 2488-89).

On January 17, 1974, the trial court judge who examined the operation of this selection system concluded from all the evidence presented that

> "the means used by the selectors did not assure a fair representation of the group [sic] to which the moving Defendants belong, to wit: The Blacks, the Latin Americans, the blue collar working class and the young in the pool from which the grand jury was selected. The pool was not shown to represent a cross-section of the community." (App. B; p. xv).

Consequently, the court ordered the indictment against petitioners quashed (App. B, p. xv).

The People of the State of California appealed, and in a decision filed on December 3, 1974, the California Court of Appeal reversed the trial court's ruling and ordered the indictment against petitioners reinstated (App. A, p. x). The Court of Appeal agreed that there was evidence to support the trial court's finding

of the existence in Marin County of the four "distinct" groups cited by the trial court (App. A, pp. ii-iii). However, the Court of Appeal held that the grand jury selection system was valid because there was no purposeful discrimination by the judge-selectors who acted in good faith. Erroneously concluding that the trial court "looked only to the result, rather than the manner, of the selection," (App. A, p. x) the Court of Appeal avoided the trial court's (and petitioners') contention that the grand jury was not selected from a representative cross-section of the community.

On January 29, 1975, the California Supreme Court denied petitioners' petition for a hearing by that court, thereby causing the remittitur to be issued by the Court of Appeal and revesting jurisdiction of the above-entitled action in the Marin County Superior Court (App. C).

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The federal questions were first presented during pre-trial proceedings in the trial court below, by motion to challenge the process of selecting the grand jury which indicted petitioners. Petitioners contended that the grand jury was illegally composed, in violation of the due process and equal protection clauses of the Fourteenth Amendment, because the grand jury was not selected from a representative cross-section of the community, in that determinable segments of the community were systematically excluded or substantially underrepresented and the selectors made no affirmative effort to familiarize themselves with the

qualifications of those eligible for jury service. A hearing on this motion was held, at the conclusion of which the trial court granted petitioners' motion, agreeing that the selection process did not assure a grand jury which represented a fair cross-section of the community (App. B, p. xv).

On respondents' appeal to the California Court of Appeal, petitioners again asserted the equal protection and due process claims in urging that the trial court's order be affirmed. The Court of Appeal rejected these contentions and reversed the trial court's order quashing the indictment, ruling that "the constitutional standard has not been violated." (App. A, p. x). A petition for rehearing was denied (App. D).

Thereafter, petitioners again raised the Fourteenth Amendment due process and equal protection arguments in a petition for hearing in the Supreme Court of California. However, the Supreme Court of California denied the petition for hearing (App. C).

REASONS FOR GRANTING THE WRIT

> "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor v. Louisiana,* 95 S.Ct. 692, 698 (1975).

This case raises a claim of unconstitutional discrimination against racial and other legally identifiable groups in grand jury selection which merits granting

certiorari. The case was incorrectly decided below, as the California Court of Appeal improperly interpreted and applied relevant decisions of this Court and those of other federal courts. Moreover, the case involves issues of transcendent importance to the goal of achieving nondiscriminatory grand jury selection. In particular, the peculiar factual situation and procedural background of this case afford this Court an appropriate vehicle by which to render applicable to the states, under the Fourteenth Amendment, the requirement that a grand jury be selected from a representative cross-section of the community, as well as to more precisely define the scope of the "affirmative duty test"[13] imposed upon grand jury selectors. The decision of this Court would be based upon a fully-formed record, consisting of numerous exhibits, comprehensive statistical data and analysis, and over 1900 pages of testimony. Finally, an eventual ruling favorable to the six petitioners herein would eliminate the necessity for them to face serious criminal charges and an extremely protracted and expensive trial under an unconstitutionally obtained indictment.

In quashing the indictment against petitioners, the trial court below found four groups or classes of people to be legally "distinct":[14] "the Blacks, the Latin

[13] *See, e.g., Cassell v. Texas*, 339 U.S. 282, 289 (1950).

[14] The cases interchangeably employ such terms as "distinct" (*Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *United States v. Butera*, 420 F.2d 564, 569 (1st Cir. 1970)), "identifiable" (*Peters v. Kiff*, 407 U.S. 493, 503 (1972); *Brooks v. Beto*, 366 F.2d 1, 22

Americans, the blue collar working class and the young."[15] The Court of Appeal agreed that there "is evidence to support the trial court's finding of four such classes in Marin."[16] However, the Court of Appeal reversed the trial court and applied an improper constitutional standard, holding that there was no evidence of "intentional" discrimination by the grand jury selectors against any of these four groups. The Court of Appeal mistakenly credited the grand jury selectors' disclaimer of discrimination and stated "the record discloses a fair and honest effort to secure a panel representing a true cross section of the county population."[17]

The Court of Appeal conclusion is erroneous, for "(t)he jury commissioners must be held to have intended the natural result which flowed from their conduct." *Rabinowitz v. United States,* 366 F.2d 34, 56 (5th Cir. 1966). Specifically, the selectors must choose a grand jury from a fair cross-section of the community. *Carter v. Jury Commissioners,* 396 U.S. 320, 332-33 (1970); *Brown v. Allen,* 344 U.S. 443, 474 (1953); *Labat v. Bennett,* 365 F.2d 698, 722-24 (5th Cir. 1966). In so doing, they have a "duty to familiarize themselves fairly with the qualifications of the

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(5th Cir. 1966)), "cognizable" (*United States v. Butera, supra,* at 569), "substantial" (*Peters v. Kiff, supra,* at 503; *United States v. Burkett,* 342 F.Supp. 1264 (D.Mass. 1972)), and "significant" (*Brooks v. Beto, supra*) when referring to groups or classes which cannot legally be discriminated against in the selection of a grand jury. This petition does likewise, since all such descriptions seem to have an identical meaning when used in this context.

[15]App. B, p. xv.

[16]App. A, pp. ii-iii.

[17]App. A, p. x.

eligible jurors of the county. . . ." *Cassell v. Texas,* 339 U.S. 282, 289; *accord, Hill v. Texas,* 316 U.S. 400, 404 (1942); *Smith v. Texas,* 311 U.S. 128, 132 (1940); *Brooks v. Beto,* 366 F.2d 1, 12-14, 23 (5th Cir. 1966). However, in the instant case the evidence is uncontradicted that the five grand jury selectors, the five judges of the Marin County Superior Court, failed to discharge this duty. They made no affirmative effort to include Latin Americans,[18] but instead chose grand jurors from their personal acquaintances and from organizations which in no way reflect a cross-section of Marin County's population. Their assertions that they did not intend to discriminate or that they acted in good faith are clearly inadequate.[19] The simple fact is, as the trial court put it, that Latin Americans were "overlooked . . . by the judges.[20]

The decision below conflicts with principles of federal constitutional law in the area of jury discrimination. The California Court of Appeal refused to follow *Cassell,* which, on the facts of this case, compelled the court below to reach the legal conclusion that the

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[18]R.T. 1010; 1167; 1172; 1351. For example, Judge Gardiner testified that he did not "recall having taken any affirmative steps" to include Latin Americans on the 1971 grand jury (R.T. 1010-11). Judge McGuire said that he, too, did not take any affirmative steps to include them and added that he was "not aware of any such identifiable group other than people who I know personally in that category" (R.T. 1167). Judge Wilson testified:

"Q. . . . To your knowledge was any effort made to include people with Spanish surnames on the grand jury in 1971?

A. Not as such, not that I can recall." (R.T. 1351).

[19]*See, e.g., Alexander v. Louisiana,* 405 U.S. 625, 632 (1972); *Turner v. Fouche,* 396 U.S. 346, 361 (1970); *Avery v. Georgia,* 345 U.S. 559, 561 (1953); *Hernandez v. Texas, supra,* 347 U.S. at 481-82; *Norris v. Alabama,* 294 U.S. 587, 594-95, 598 (1935).

[20]R.T. 2603.

failure of the grand jury selectors to fairly familiarize themselves with the eligible Latin Americans resulted in discrimination. The Court of Appeal avoided reaching the legally required conclusion by the creation of a novel exception to the Fourteenth Amendment. The court below agreed and found that Latin Americans constituted an identifiable group but held that it could be overlooked because it was not "identifiable" enough. At best, this is specious reasoning and is internally inconsistent. A group either is or is not legally identifiable in a particular community.

The novel exception which the court below has engrafted on the Fourteenth Amendment unless corrected by this Court will undermine decades of efforts to eradicate discrimination in grand jury selection and service. The opinion below revives the "two-class theory" which this Court rejected over twenty years ago in *Hernandez v. Texas,* 347 U.S. 475, 478 (1954). There, this Court stated, "(t)he Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." Once a group is determined to be an "identifiable one, the selectors cannot ignore it and thereby withhold Fourteenth Amendment protections. In terms of size, militancy, and group characteristics, Latin Americans do not have to be fungible with Blacks in order to enjoy Fourteenth Amendment rights. As this Court stated in *Hernandez,* ". . . community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." 347 U.S., at 478.

If the decision of the Court of Appeal is allowed to stand, discrimination itself will become a justification for exclusion. Latin Americans constitute the largest minority in the State of California and in Marin County. They are estimated to comprise 6% of Marin's population of approximately 207,000 persons.[21] There are nearly three times as many Latin Americans in Marin County than there are Blacks, who constitute approximately 2% of the county's total population.[22] Yet the Court of Appeal would allow them to be excluded on the basis of the erroneous determination that they are "at most a very small proportion of the population."[23]

The Court of Appeal would tolerate the denial of equal protection by distorting evidence relative to the discriminatory effect of ethnic isolation in Marin County. The court below asserted that Latin Americans are "not readily recognized."[24] This was clear distortion of testimony along this line:

> "Q. Do you think that there is a Mexican-American Spanish speaking, Spanish heritage community in Marin County?
>
> A. Oh, very definitely. It just isn't very recognized, that's all.
>
> I mean, it is recognized by our own people, but not by, say, the majority of Marin County which is Anglo-Saxon white."[25]

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[21] 1970 Census (California), *General Social and Economic Characteristics*, p. 6-1034.

[22] 1970 Census (California), *General Population Characteristics*, p. 6-310.

[23] App. A, p. vii.

[24] App. A, p. viii

[25] R.T. 1981. The grand jury selectors were Anglo-Saxon white, lived in all-white communities, and belonged to all-white profes-

The decision below has the potential to effectively repeal the Fourteenth Amendment. Application of its rationale throughout California and in other states would permit the withholding of Fourteenth Amendment protections solely because the group or class against which discrimination was directed might be deemed "small and not readily recognized by the community generally."[26] Litigants in such jurisdictions would have to shoulder an additional burden of proving that the failure to fairly familiarize was not "self-induced" by "an intentional closing of the eyes to facts widely known,"[27] whereas litigants in other jurisdictions presumably would not need to prove that such discrimination was self-induced. The right to due process and equal protection of law cannot be made to depend upon such territorial happenstance. *Compare O'Brien v. Skinner,* 414 U.S. 524 (1974).

Moreover, the law is clear that, whether done intentionally or in good faith, the failure of the selectors to acquaint themselves with eligible constituents of the Latin American community constitutes a failure to meet their constitutional duty to select a grand jury from a representative cross-section of the community. "The result bespeaks discrimination, whether

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sional, civic, social and religious organizations (R.T. 920-21; 1069; 1113-15; 1254-55; 1337-38). Any selection system in which the judges of the local superior court act as key-men is likely to produce an unconstitutional outcome. Such selectors are "by reason of birth, education, residence, wealth, social and professional associations and similar factors not acquainted with the qualifications of the eligible grand jurors" who do not belong to their own race and class. *Montez v. Superior Court,* 10 Cal.App.3d 343, 350 (1970).

[26]App. A, p. viii

[27]*Id.*

or not it was a conscious decision on the part of any individual jury commissioner." *Hernandez v. Texas, supra,* 347 U.S., at 482.

Young people and blue collar workers were substantially underrepresented. It was found by the trial court that they were cognizable groups in Marin County. Statisticians for both sides showed a significant statistical bias against these groups on the Marin County grand jury. In other words, the probability that such an underrepresentation could have obtained by the operation of chance alone was at best remote and at worst astronomically low.[28] Such statistical evidence strongly suggests a discriminatory selection process,[29] and the state failed adequately to explain such discrimination. Latin Americans, of course, were simply forgotten (see *supra*). The proffered justification for the gross underrepresentation of blue collar workers and youth, while perhaps not so totally devoid of reason, is nevertheless wholly insufficient constitutionally.

Two selectors asserted that it was difficult to nominate persons from these two identifiable groups (as well as from among Blacks, see *infra*) because economic and educational pressures would prevent such people from devoting the time necessary to properly discharge their duties, especially administrative, as

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[28] *See generally* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 HARV.L.REV. 338 (1966), *cited in Whitus v. Georgia,* 385 U.S. 545, 552 (1967).

[29] *Whitus v. Georgia, supra,* 385 U.S. at 552.

grand jurors.[30] One of these selectors, however, apparently arrived at this sweeping judgment by pure speculation,[31] and the other did so on the basis of talking to no more than a relative handful of the members of these groups.[32] The result was to virtually exclude both blue-collar workers and youth as a *class.*

It would seem clear that the state must offer a more persuasive reason for denying a constitutionally-protected right: petitioners' right to deliberation by a grand jury which contains a representative cross-section of the community. This Court has recently held that "(t)he right to a proper jury cannot be overcome on merely rational grounds." *Taylor v. Louisiana, supra,* 95 S.Ct., at 699-700. Although the *Taylor* case admittedly involved a challenge to a petit jury venire, this Court has stated that the principles applicable to the systematic exclusion of potential jurors "are essentially the same for grand juries and for petit juries. . . ." *Alexander v. Louisiana,* 405 U.S. 625, 626 n. 3 (1972); *accord, Pierre v. Louisiana,* 306 U.S. 354, 358 (1939).

The testimony of the selectors in the instant case offers an excuse for the exclusion of cognizable groups which clearly does not arise above the "merely rational grounds" proscription of the *Taylor* case.[33] This Court

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[30]It should be noted that, in apparent contradiction to this testimony, one selector stated that there was no affirmative or "conscious" effort to include blue-collar workers or young people on the grand jury (R.T. 1347-48).

[31]R.T. 1062-64.

[32]R.T. 954-55.

[33]It is arguable that not even "rational" grounds were offered for such exclusion. In *Labat v. Bennett, supra,* the jury selectors

in *Taylor* specifically emphasized that although the states are free to exempt from jury service *individuals* who would be subject to hardship if made to so serve, the states cannot on that basis blanketly exempt entire groups and thereby render the remaining jury pool unrepresentative of the community. 95 S.Ct., at 700. Just as this Court in *Taylor* rejected the contention that it would be a hardship for "each and every woman to perform jury service,"[34] so also is it untenable to suggest that all, or virtually all, blue collar workers and young people would be subjected to hardship if required to serve on the Marin County grand jury.

Moreover, the state had available to itself alternatives which are less restrictive of the due process and equal protection rights of criminal defendants: for example, the establishment of two separate grand juries, one to consider criminal indictments and the other (consisting of persons who have more time to devote to grand jury service) to carry out the "watchdog" function of overseeing the administration of county government.[35] But, no such alternative was

excluded daily wage earners as a class on the ground of "financial hardship." The court found that this violated the Equal Protection Clause of the Constitution because the economic standing of such people had no reasonable relationship to their competency as jurors. 365 F.2d, at 723. *Cf. Thiel v. So. Pacific Co.*, 328 U.S. 217 (1946).

[34]95 S.Ct., at 700.

[35]Because of just such considerations, this procedure was recently adopted, effective March 1, 1975, in Marin's neighboring county of San Francisco. *See* San Francisco *Chronicle*, January 28, 1975, at 5, col. 6. Similarly, California State Assemblyman Edwin L. Z'berg has introduced into the California legislature a bill which would require California counties of over 700,000 population to impanel two separate grand juries—an "indictment

employed; instead, it was considered easier to choose a grand jury from sources not reflective of the community of Marin County.

The other identifiable group cited by the trial court in quashing the grand jury indictment herein is "Blacks." This group is technically overrepresented on the grand jury as compared to its percentage of the population in the community as a whole. However, a close look at the evidence reveals unconstitutional discrimination in the selection of this racial group as well. The testimony of the selectors reveals that the two Blacks chosen for the 1971 grand jury both were personally acquainted with several of the selectors, coming as they did from the same social or political circles as the selectors.[36] There was no attempt by the selectors to familiarize themselves with the qualifications of the eligible Blacks in Marin County as a whole and not just of their personal acquaintances. *Cf. Cassell v. Texas, supra; Smith v. Texas, supra.* The irresistible conclusion to be drawn from this practice is that the selectors, aware of the long line

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panel" and a "civil panel". In apparent recognition of the fact that grand jury panels have heretofore often been unrepresentative of the communities from which they were chosen, any county's indictment panel would have to be selected by "random selection" in the same manner as the trial jury venire of that county. However, under the provisions of this proposed legislation, the presiding Superior Court judge in counties under 700,000 population (which would include Marin County) would retain the discretion to impanel either two separate grand juries or a single grand jury combining both indictment and civil functions. California A.B. 352, 1975-76 Reg. Sess. (December 26, 1974).

[36]R.T. 1275-76; 1379. Both Blacks could only be described as middle-class, occupationally and economically. Their respective incomes were nearly three times that of the average Black person in Marin County (Ex. 34; Ex. E).

of Supreme Court cases proscribing discrimination against Blacks in grand jury selection,[37] decided they had to include some black faces on the grand jury list.

Such token inclusion[38] fails to satisfy the cross-section requirement.

One final point must be discussed. Petitioners' grand jury challenge was based solely upon the selection process for one year—1971. The Court of Appeal made much of this fact, noting that petitioners failed to show "a substantial history of gross inadequacy of representation"[39] of the cognizable groups herein involved. As a result, the Court concluded, unconstitutional discrimination was not, and could not be shown to exist, because "[p]roportional representation is not required" on a single grand jury.[40]

Such reasoning is hardly persuasive in the instant case. It is certainly true, as the Court says, that proportional representation on a single grand jury of every determinable group is not required,[41] and petitioners have never claimed otherwise. But this Court has emphasized that a showing of discrimination in the grand jury selection process

> "does not depend upon systematic exclusion continuing over a long period and practiced by a succession of jury commissioners. Since the issue

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[37] *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880).

[38] *Cf. Cassell v. Texas, supra*, 339 U.S., at 287.

[39] App. A, p. iv.

[40] App. A, p. v.

[41] *Cassell v. Texas, supra*, 339 U.S., at 286; *Akins v. Texas*, 325 U.S. 398, 403 (1945).

must be whether there has been discrimination in the selection of the jury that has indicted petitioner, it is enough to have direct evidence based on the statements of the jury commissioners in the very case." *Cassell v. Texas, supra,* 339 U.S. at 290.

Cf. Alexander v. Louisiana, supra (wherein a finding of unconstitutional discrimination was based upon the selection of one grand jury only). In the instant case, the selectors, as established by their own testimony, completely ignored Latin Americans as a source of grand jurors. The exclusion of blue collar workers and young people was almost as blatant (see *supra).*

Moreover, as the Court of Appeal observed, "this grand jury is the first chosen in Marin County under the present method."[42] This fact not only adequately explains the failure of petitioners to introduce comprehensive statistical evidence of prior grand jury composition, but is in itself arguably tantamount to proof that the former selection procedure was constitutionally defective. Indeed, the selectors testified that they had changed the selection procedure because of the many complaints they had received and because of their own belief that the former system was not producing representative grand juries.[43]

In any event, it is preposterous to conclude that the institution of a new grand jury selection procedure precludes a finding of discrimination in the selection

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[42]App. A, p. iv.

[43]Latin Americans, for example, apparently had been totally ignored by the selectors, and thus systematically excluded, for many years prior to 1971 (R.T. 1907-08; 1917).

process. Such a holding would enable a county to perpetually insulate itself from such attack simply by revising its grand jury selection procedure with the choosing of each new grand jury.

This Court recently emphasized the potential for abuse in the process of selecting petit juries, when it observed that

> "[t]he purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [Citation omitted.] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Taylor v. Louisiana, supra,* 95 S.Ct., at 698.

This language, however, probably applies even more forcefully to the composition of *grand* juries. Unlike trial by a petit jury, a grand jury proceeding affords a potential defendant virtually no procedural protections. The right to counsel, to confrontation and cross-examination of witnesses, and even simply to be present, are all absent. For this reason, the courts should be especially vigilant in assuring that a strict standard for the selection of grand juries be observed. The granting of this petition, and an ultimate judgment in favor of petitioners, would be a significant

step toward making the attainment of that goal a reality.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated, March 11, 1975.

Respectfully submitted,

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(Appendices Follow)

Appendix A

(CERTIFIED FOR PUBLICATION)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 CRIMINAL No. 12848
(SUP. CT. No. 4094)

People of the State of California,
Plaintiff and Appellant,
vs.
Hugo A. Pinell, et al.,
Defendant and Respondents.

[Filed Dec. 3, 1974]

OPINION

All defendants were indicted for murder. (Pen. Code, § 187), conspiracy (Pen. Code, § 182), and assault with a deadly weapon by a prisoner either under life sentence (Pen. Code, § 4500) or a sentence for less than life (Pen. Code, § 4501). All moved to quash the indictment (Pen. Code, § 995) on the ground that the grand jury which returned the indictment in 1971 was improperly chosen.

Respondents contend that "significantly identifiable elements" of the population of Marin County had been excluded from the pool of 30 names from which the 19 grand jurors for 1971 were drawn. An extended evidentiary hearing was held. Among the witnesses were the judges of the superior court. They solicited names of prospective jurors from a total of 79 civic, labor, ethnic and other organizations of the county, receiving 75 names from that solicitation. They added 30 names they had personally gathered. The judges testified that they collectively sought to obtain a fair cross section of the community, including old and young, male and female, black and white, rich and poor, and those with a knowledge of each section of the county, and that no group was intentionally excluded. Questionnaires were sent to each of the 105 thus chosen. From the replies, the judges unanimously selected 30 names for the grand jury panel. These names were placed in the jury wheel, and the 19 to serve on the 1971 grand jury were chosen by the usual random method.

From the mass of evidence before it, the trial court concluded that "the means used by the selectors did not assure a fair representation of the group to which the moving Defendants belong, to wit: The Blacks, the Latin Americans, the blue collar working class and the young in the pool from which the Grand Jury was selected. The pool was not shown to represent a cross-section of the community."

Whether a group constitutes a "distinct class" in a particular community is a question of fact. (*Hernandez v. Texas*, 347 U. S. 475, 478.) There is evi-

dence to support the trial court's finding of four such classes in Marin.

But it must be "further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification," to establish that the constitutional guaranties have been violated (id.).

The mechanics of the selection process here used are well within the scope of the statute (Pen. Code, § 903.4) governing the choice of grand jurors in California. Constitutionality of this statute has been repeatedly upheld by our courts (In re Wells, 20 Cal. App. 3d 640, 649; People v. Newton, 8 Cal. App. 3d 359, 388; People v. Cohen, 12 Cal. App. 3d 298, 309). The United States Supreme Court has upheld a comparable statute (Carter v. Jury Commission, 396 U.S. 320, 331-6). Thus the law "as written" meets constitutional standards.

The core issue is whether the selection process "as applied" in this case singles out for different treatment any of the classes to which defendants belong.

The long-established rule is that equal protection is denied only by a method of selection which "intentionally and systematically" excludes or underrepresents a cognizable class (Whitus v. Georgia, 385 U. S. 545, 548-52; Hernandez v. Texas, 347 U. S. 475, 476-8; In re Wells, 20 Cal. App. 3d 640, 649; People v. Nero, 19 Cal. App. 3d 904, 910). The rule applies to grand as well as petit juries.[1] Direct proof that

[1]Deep concern for meticulous care in the selection of trial juries is readily understandable. Under Federal as well as California procedures, the trial jury has broad fact-finding powers which go

elimination or undue reduction of members of a class is intentional or purposeful is frequently impossible. But the element of purpose may be deduced from a substantial history of gross inadequacy of representation of a class (e.g. Smith v. Texas, 311 U.S. 128, 131). When a defendant shows a history, he has made a prima facie case of discrimination, and the burden shifts to the prosecution to explain and justify the discrepancy. Since this grand jury is the first chosen in Marin County under the present method, there is no such history.

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to the essence of fairness and equal protection. We recognize that the Federal rule as to grand juries has been extended indiscriminately to all 50 states, regardless of their practice and procedure, and that the courts of California have, with little or no comment, accepted and applied this rule to indictments in California. But the grand jury is solely an accusatory body. Under the Federal procedure, the evidence upon which it acted is zealously withheld from the defendant, who is forced to go to trial and can raise no issue of insufficiency of the evidence until the prosecution, at trial, rests its case (see Draper, State Experience Points Way for Improvement of Federal Criminal Procedure (1967) 42 State Bar J. 34). California, since 1927, has required delivery to each indicted defendant of a copy of the transcript of testimony before the grand jury. (Pen. Code, §938.1, derived from Stats. 1927, ch. 684, p. 1156, §2 [then Pen. Code, §925].) The defendant, fully informed by the transcript of the accusatory evidence against him, is given the right to have the indictment set aside upon a judicial determination that such evidence does not constitute reasonable or probable cause to charge him, (Pen. Code §995) and to have that determination reviewed by an appellate court (Pen. Code §999a). Thus as indicted defendant, before undergoing the burden of trial, can have a full determination of the adequacy of the evidence to warrant a charge against him. At least arguably, this places a lesser burden upon him than the alternative procedure—complaint by a law officer, preliminary examination before a magistrate, and information filed by a district attorney. In this opinion, we assume applicability of the Federal rule to a California indictment. We but note the distinctions in procedure in the somewhat faint hope that they may at least lead to consideration of some amelioration of the Federal practice as to grand jury testimony and the setting aside of indictments.

"Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals * * * . Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried * * * . The mere fact of inequality in the number selected does not in itself show discrimination." (Akins v. Texas, 325 U.S. 398, 403.) Proportional representation is not required, and the proportional limitation necessary to achieve it is forbidden. (Cassell v. Texas, 339 U.S. 282, 287.)

Here there is no evidence of intentional discrimination by the selectors against any of the four groups which the trial court found to exist. Their testimony to the contrary is not disputed. Respondents, however, argue that they met their burden by showing that the selectors had an opportunity to discriminate and that four cognizable groups are statistically underrepresented. The authority they cite (Alexander v. Louisiana, 405 U. S. 625, 631) does not support this argument. The one decision most nearly approaching respondents' view (United States v. Butera (1 Cir. 1970) 420 F. 2d 564, 569) notes (fn. 7, p. 568) that it does not create a constitutional standard for the states, but rests upon the supervisory power of the federal appellate courts over the federal trial courts. Morover, *Butera* holds only that such a situation places upon the government the burden of demonstrating that the disparities are not the product of discrimination. Thus, even if the rule be fully applied

to the facts before us, it does not result in holding this selection process invalid. We look at each of the four groups involved.

Blacks constitute 6.7 percent of the panel of 30, but only 2.4 percent of the population of Marin County is black. Hence, *Butera* cannot apply. Respondents urge that these black panel members have family incomes substantially in excess of that of the average black. No authority is cited for the view that this bespeaks racial discrimination, or suggests that selection of archetypes is required to avoid an inference of discrimination. A defendant is not entitled to a "jury tailored to the circumstances of the particular case," (Hoyt v. Florida, 368 U. S. 57, 59; People v. Newton, 8 Cal. App. 3d 359, 390-1).

As to the class of "Latin Americans" found by the trial court to be a cognizable group, the problem of representation is statistically more difficult. Census figures identify but two classes—"Spanish surname" (1.7% of the population) and "persons of Spanish language." (4.1%.) Respondents variously, and sometimes apparently interchangeably, refer to "Chicanos" (those of Mexican or Central American origin or descent), and "Latinos" (those whose origin or descent traces to countries of South America). Mexican-Americans and "Spanish heritage people", the group which respondents most emphasize, and which the court terms Latin Americans, are natives of Mexico and Central America and their children. Census figures do not cover such a group. One witness for respondents testified that 3000 of the "Span-

ish language persons" in Marin County are Mexican-American. It is apparent that it is but a small proportion of the whole. There is evidence that they have a feeling of ethnic identity, experience common economic and educational difficulties, and suffer some job discrimination. This evidence, as we have held, supports the finding that they constitute a cognizable group. But there is no evidence or suggestion of any discrimination by the selectors.

We recognize that where a substantial racial group, long-recognized and visible in the locality, is limited to mere token representation, the discrepancy cannot be excused upon the ground that the selectors knew no qualified persons of the misrepresented race (Cassell v. Texas, supra, 339 U. S. 282, 289). It is quite true that although the panel included three classified as "Spanish surname", none were Chicanos or Latin Americans. The selectors here testified that they knew of no organizations of Latin Americans, did not consider this racial group an identifiable group of the population, and for these reasons, did not specifically seek out representation of that group. But *Cassell* obviously is designed to root out disguised discrimination. Here, the record disclosed omission of a group which constituted at most a very small proportion of the population, was not readily visible, was geographically dispersed, possessed few or no organizations, and was partially assimilated in the general population. A principal complaint of those members of the group who testified was that the group is little known or recognized by the general community. These cir-

cumstances sharply differentiate their case from the facts of *Cassell.* There, blacks made up 15.5% of the population of Dallas County, Texas. Information as to the qualifications of members of this sizeable group, long existent and well known in the general community, was readily available. Thus "[t]he statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area were Negroes made up so large a proportion of the population, proved the intentional exclusion that is discrimination * * * " (339 U. S. at p. 290). There, the claimed blindness of the selectors obviously was self-induced—an intentional closing of the eyes to facts widely known. Here, on the contrary, the group involved is small and by its own members' testimony, not readily recognized by the community generally. In the vast range of racial strains to be found in the average American community, the oversight here bespeaks the opposite of intentional discrimination. There seems no basis for even an "inference of discrimination" under *Butera,* but even if that inference exists, it is fully dispelled by the evidence.

As to both the classes of youth and "blue collar workers" the selectors' testimony that they made particular efforts to secure their full representation is uncontradicted. There is no evidence of intentional or systematic exclusion. To suggest a rule in any way based upon some requirement of proportional representation of the many possible divisions of age and economic groups is to introduce an element of extreme and unwarranted difficulty into the jury

selection process. (See *Hamling v. United States*, ... U. S. ....., 94 S. Ct. 2887; *People v. Johnson*, 38 Cal.3d 228, 241, fn. 5.) Respondents focus upon the 21-30 age group. Of the total population of Marin County over the then age of majority, 22% were in the 21-30 age bracket, but only 6.6% of the panel were in this group. As to "blue collar workers" 25% to 29% of the population is in that class, and the panel contained 6.6%. (We note appellant's contention that 20% of the panel had incomes under $9,000, but feel it irrelevant in light of the trial court's use of "blue collar workers" as the relevant class.) But under even the broadest interpretation of *Butera*, "it is not the significant unexplained disparities themselves which are unconstitutional [citations]; they only raise the inference of discrimination. [Citations.] Once that inference has been raised, it is the government's failure or inability to demonstrate that the disparities are not the product of discrimination which confirms the inference and invalidates the jury pool." (420 F. 2d at p. 569.)

Here, the record contains uncontradicted evidence that the selectors made substantial efforts to secure larger numbers of both youth and labor groups. But educational, family and financial obligations rendered many of the younger people unable or unwilling to serve, and of the laboring group, financial consideration left them unable to afford the time necessary to grand jury service. As held in *Butera* itself (420 F. 2d at pp. 573-4), these are entirely proper grounds for deletions from the 105 who returned questionnaires to the selectors. And since there is no suggestion of

any discrimination in such omissions, any inference which even *Butera* would raise is thoroughly dispelled.

Respondents at most have shown a statistical imbalance in this one grand jury by which one small racial group, the Latin American, one age group, the young, and one earning group, the blue collar workers, each was represented on the grand jury panel of 30 by less than its proportion of the total population of the county. But the "mere fact of inequality in the number selected does not in itself show discrimination" (Akins v. Texas, supra, 325 U.S. at p. 403). There is neither evidence nor suggestion of purposeful discrimination by any of the five superior court judges who were the selectors of the panel. Nor, as we have demonstrated, is there any basis for an inference of discrimination. On the contrary, the record discloses a fair and honest effort to secure a panel representing a true cross section of the county population. The trial court did not find otherwise, but held the selectors to an excessively rigorous standard when it looked only to the result, rather than the manner, of the selection. Thus the constitutional standard has not been violated.

The order setting aside the indictment is reversed.

CERTIFIED FOR PUBLICATION.

Draper, P. J.

We concur:

Brown (H. C.), J.

Good, J.*

*Retired Judge of the Superior Court, assigned by the Chairman of the Judicial Council.

Appendix B

In the Superior Court of the State of California
in and for the County of Marin

No. 4094

The People of the State of California
Plaintiff,
vs.
Stephen Mitchell Bingham, Hugo A. Pinell, John L. Spain, Louis N. Talamantez, Fleeta Drumgo, David Johnson and Willie Tate,
Defendants.

[Filed Jan. 17, 1974]

ORDER

The specific motion to be under consideration by the Court at this time is that one made by Defendant Spain, and joined in by all other Defendants herein, excepting Stephen Mitchell Bingham, whose present whereabouts the Court is advised, is unknown. He will be referred to herein only incidentally, leaving his claim to fame being the first named Defendant in these proceedings.

At first glance, the problem in this matter is to simply determine whether or not representation from an identifiable group of which a Defendant is a mem-

ber has been systematically excluded from the Grand Jury.

Defendants have urged that there are several "identifiable groups" in the County of Marin which the various Defendants fall:

1. The blacks.
2. The low wage blue collar class.
3. The Chicanos, or "Latinos".
4. The group of which the Defendants are without question members. Those residing in San Quentin, and those persons previously involved in criminal matters and described generally as ex-convicts.

As the Defendant Bingham did not join in this motion, and there is no evidence as to him belonging to any identifiable groups, his rights are not to be determined, and anything we say here will not be binding on him, and certain assumptions may be made concerning him. At the time this offense occurred, he was a member of the Bar, white, not of the blue collar working class, not a member of the convict or ex-convict class, and we will assume he is not a Latin American.

The Defendants Spain, Pinell, Drumgo, Johnson and Tate claimed that they were members of classes: 1. Black, 2. Low wage blue collar, 4. Convicts.

The Defendants Talamantez and Pinell claimed to be members of classes: 2. Low wage blue collar, 3. Chicano or Latino, 4. Convicts.

The California courts have held that to enable Defendants to object to the composition of a Grand Jury

on the grounds that members of an identifiable group have been systematically excluded from the Grand Jury, they must establish that they are members of tha group which has been excluded.

This apparently is the rule in California, though the Federal rule is otherwise. By the Federal rule, the manner of selection of a Grand Jury can be challenged on the basis that it was not chosen in a manner to represent a cross-section of the community by any Defendant.

A result of the California rule is that as to some Defendants an indictment may be quashed, and as to others may not be. The effect is that now you have a legally constituted Grand Jury, and now you don't. In the instant matter, the Grand Jury may have been legally constituted as to Defendant Bingham, but not as to the remaining Defendants.

The phrase "identifiable group" has been used throughout this hearing. In other proceedings the terms "significantly identifiable elements", "sociologically distinct groups", "cognizable groups", "legally cognizable groups" have been used. They all seem to mean the same thing.

The Court states in *Montez v. Superior Court,* 10 CA (3) 343 at 350 discussing "systematically deprived eligible members of their class from being considered for Grand Jury duty," quotes *Cassell v. Texas,* 339 U.S. 282, at 285 and 287 where "as a proportional matter 6.5% of Grand Jurors would be Negroes" and "actually over a five year period 6.7% had been Black." The Grand Jury was held to have been con-

stitutionally inadequate because "the testimony of the Jury Commissioner revealed that in selecting nominees they did not adequately acquaint themselves with the qualifications of eligible jurors of the Negro race in order that they might comply with the constitutional mandate that the jury be selected in such a way that "there has been neither *inclusion* nor *exclusion* because of race."

In *U.S. v. Butera,* 250 Fed. Reporter (2) 564, the Court recognizes as groups the following: Age groups, educational background, males and females.

The Court goes on to say: " 'Purposeful discrimination' is not limited to bad faith but exists where any significant *unexplained* disparities exist. The significant disparities are not unconstitutional. They raise an inference of discrimination."

Once the inference has been raised, it is the government's inability to demonstrate that the disparities are not the product of discrimination which can form the inference and invalidates the jury pool.

Selectors (commissioners) made an effort to retain persons whose groups might be otherwise depleted. Butera, siting in Note 23 page 574, cases in which "purposeful inclusion may sometimes be justified in order to correct an *existing inbalance.*"

But by whatever means may be used, the selection from these groups, out of which the Grand Jury is to be chosen, must represent a fair cross-section of the community.

The Court is of the opinion that the means used by the selectors did not assure a fair representation of the group to which the moving Defendants belong, to wit: The Blacks, the Latin Americans, the blue collar working class and the young in the pool from which the Grand Jury was selected. The pool was not shown to represent a cross-section of the community.

The Court is doubtful that it is a practical possibility to select a Grand Jury complying with the constitutional requirements through the means provided in Sections 895-900 of the Penal Code. It may be accomplished by following the procedures outlined in Section 903-903.3.

The motion of Defendants is granted, and the indictment is hereby ordered quashed.

Dated: January 17, 1974.

/s/ Vernon Stoll
Vernon Stoll
Judge of the Superior Court

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Jan. 29, 1975

I have this day filed Order
Hearing denied.

In re: 1. Crim. No. 12848

People vs. Pinell, et al.

Respectfully,
G. E. Bishel
Clerk

Appendix D

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

Crim. No. 12848

People of the State of California,
Plaintiff and Appellant,
vs.
Hugo A. Pinell, et al.,
Defendant and Respondents.

[Filed Jan. 2, 1975]

BY THE COURT:

The petition for a rehearing filed in the above entitled cause is hereby denied.

Dated: Jan. 2, 1975.

/s/ H. C. Brown, Acting P.J.
H. C. Brown, Acting P.J.

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

Crim. No. 12848

People of the State of California,
Plaintiff and Appellant,

vs.

Hugo A. Pinell, et al.,
Defendant and Respondents.

[Filed Jan. 2, 1975]

BY THE COURT:

The petition for rehearing filed on behalf of appellants' John L. Spain, Fleeta Drumgo, David Johnson and Willie Tate is denied.

Dated: Jan. 2, 1975.

/s/ H. C. Brown, Acting P.J.
H. C. Brown, Acting P.J.

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

Crim. No. 12848

People of the State of California,
Plaintiff and Appellant,
vs.
Hugo A. Pinell, et al.,
Defendant and Respondents.

[Filed Jan. 2, 1975]

BY THE COURT:

The petition for rehearing filed on behalf of appellant Luis N. Talamantez is denied.

Dated: Jan. 2, 1975.

/s/ H. C. Brown, Acting P.J.
H. C. Brown, Acting P.J.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1180

HUGO A. PINELL, JOHN L. SPAIN, LUIS N. TALAMANTEZ, WILLIE TATE, DAVID JOHNSON, and FLEETA DRUMGO,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On January 17, 1974, the Superior Court of the State of California for the County of Marin filed an order quashing a five-count murder indictment which had been returned against petitioners by the Marin County Grand Jury on October 1, 1971 (see, Pet. App. B). That order is unreported.

On December 3, 1974, the California Court of Appeal filed an opinion reported at 43 Cal.App.3d 627,

117 Cal.Rptr. 913, reversing the order setting aside the indictment (see Pet. App. A).

On January 29, 1975, the California Supreme Court, without opinion and without dissent, denied petitioners' application for a hearing (Pet. App. C).

JURISDICTION

The jurisdiction of this Court is invoked under Title 18, United States Code, section 1257(3).

QUESTIONS PRESENTED

I. Whether Latin-Americans, young adults and low income blue-collar workers, were constitutionally cognizable groups in Marin County when the 1971 grand jury which indicted petitioners was selected.

II. Whether the 1971 Marin County grand jury panel was selected in compliance with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

Petitioners allege that four classes of citizens were subject to impermissible discrimination in the selection of the 1971 Marin County Grand Jury: blacks, young people (age 21-29), low wage blue-collar workers and Latin Americans.

I. It is California's position first, that three of the above classes were not constitutionally cognizable groups for purposes of grand jury selection.

A. As argued more fully below, we submit that age group 21-29 is not a constitutionally cognizable group. Nearly all federal courts have refused, as a matter of law, to impose age standards on grand jury selectors. See, *Carter v. Jury Commission,* 396 U.S. 320, 332-333 (1970); *Hamling v. United States,* 418 U.S. 87, 137 (1974); *United States v. Greene,* 489 F.2d 1145, 1149 (D.C. Cir. 1973) and cases there cited; *United States v. Ross,* 468 F.2d 1213, 1217 (9th Cir. 1973); *cf. United States v. Butera,* 420 F.2d 564 (1st Cir. 1970).

B. The alleged class low wage blue-collar workers is flawed by uncertainty and overinclusiveness. It is common knowledge and the census shows that many workers in craft occupations earn very high annual incomes. Thus, the group low wage blue-collar workers is a contradiction in terms and not cognizable for grand jury selection purposes. *Quadra v. Superior Court of City and County of San Francisco,* 378 F.Supp. 605, 621-622 (N.D.Cal. 1974) and cases there cited.

C. As used by petitioners, the term "Latin Americans" confuses discrete classes of citizens. It is alleged to include Spanish language citizens and Spanish surnamed citizens, groups defined by the census, as well as "Chicanos" and "Latinos",

groups not defined by the census. As such, the group "Latin Americans" is overinclusive and ambiguous and hence not a cognizable group for purposes of grand jury selection. Indeed, in the state courts petitioners' emphasis was on the "Chicano" group, not "Latin Americans".

Identification of either group is thus statistically difficult under the census. There were no geographical concentrations of the group in the county, the group had not established any ethnic organizations in the county and most importantly the "Chicano" group constituted only a very small proportion (3,000 persons or about 1.5 percent) of the Marin County population. Thus, while "Latin Americans" may well be a cognizable group in San Antonio, Texas, that is not the case in Marin County. *Hernandez v. Texas,* 347 U.S. 475, 479-480 (1954).

II. At all events, it is California's position that the grand jury was selected in compliance with the Equal Protection Clause in that:

A. There is no evidence whatever of intentional discrimination. *Hamling v. United States, supra,* 418 U.S. at 138; *Swain v. Alabama,* 380 U.S. 202 (1965).

B. The undisputed evidence shows that the judges who selected the panel exercised affirmative efforts to obtain a fair cross-section of the county, including blacks, young adults and low income blue-collar workers.

C. Blacks were overrepresented on the panel (6.7%) compared to their number in the population (2.4%).

D. Statistical underrepresentation of the young and low income blue-collar workers despite the selectors' affirmative efforts was adequately explained by the fact that educational, family, and financial obligations made them unwilling or unable to afford the time necessary for grand jury service.

E. Absence of "Latin Americans" or "Chicanos" on the panel was adequately explained by evidence that:

1. Identification of this group was statistically difficult under the census;

2. That the group was geographically dispersed throughout the county;

3. That the group had not established any ethnic organizations in the county;

4. That the group constituted only a very small proportion (1.5 percent) of the county population.

5. Spanish language and Spanish surname persons were fairly represented on the panel.

F. No evidence of intentional discrimination or statistical underrepresentation in any prior years was presented by petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, Section 1:

> ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 1, 1971, the Marin County Grand Jury returned an indictment charging all six petitioners herein with five counts of murder (Cal. Pen. Code § 187), and one count of conspiracy (Cal. Pen. Code § 182); charging petitioners Pinell, Talamantez and Spain with violation of California Penal Code section 4500 (assault with a deadly weapon by a life prisoner); charging petitioners Tate, Drumgo and Johnson with violation of Penal Code section 4501 (assault with a deadly weapon by a non-life prisoner) (CT 1-8). Prior convictions were also alleged against all of the petitioners herein, who were state prisoners at the time of the alleged crimes which were committed on August 21, 1971 (CT 8-11). Lenthy pretrial proceedings ensued (see, e.g., *Drumgo v. Superior Court,* 8 Cal.3d 930, 106 Cal.Rptr. 631 (1973).

On September 17, 1973, petitioner Spain filed a motion to set aside and quash the indictment. All petitioners herein joined in that motion (CT 171).

On January 17, 1974, after a lengthy evidentiary hearing before a judge from another county, an order

granting the motion to quash was issued (CT 171-295).[1]

The People filed notice of appeal on January 18, 1974 (CT 296-297). On December 3, 1974, the Court of Appeal reversed and remanded the matter for trial. Jury trial has since commenced and is presently underway.

STATEMENT OF FACTS

A. Mechanics of Selection of Grand Jury.

The 1971 Marin County grand jury was made up of nineteen persons,[2] randomly drawn,[3] from a panel of thirty nominees[4] (RT 848-850).

The panel was selected by the county's five superior court judges[5] acting in concert (RT 948). They were aided in making their selections by their solicitation by letter of suggestions from some 79 civic and social groups in the county (RT 877-881, 1116-1117). Seventy-five suggested names were received by the judges from these organizations (RT 947, 1081). In addition, the judges considered some thirty other prospective

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[1]On September 11, 1974, the selection and composition of the same 1971 Marin grand jury had been upheld in another case which is now pending on appeal in the California Court of Appeal. We refer to *People v. Gibson and Justice*, 1/Crim. No. 12598, in the files of said Court. In addition, the selection of the 1970 Marin County grand jury was upheld in *People v. Angela Y. Davis*, Marin Superior Court No. 4094.

[2]As prescribed by then California Penal Code section 888.2.

[3]As prescribed by then California Penal Code section 900, 902.

[4]As prescribed by then California Penal Code section 904.

[5]As prescribed by then California Penal Code section 896.

nominees not suggested by any organizations. Some of these were persons known to the judges, some were volunteers and some were based upon suggestions from other independent sources (RT 945, 1344, 1366).

Each of these 105 nominees was sent a questionnaire, which was used as an initial basis for elimination and selection (RT 973-974). A consensus process was then utilized by the judges to reduce the total 105 suggested nominees to the thirty-member panel (RT 1446). The judges agreed unanimously on the 30 nominees selected (RT 951-952, 974-977). Of the thirty selected, sixteen had been suggested by the civic groups, twelve were suggested by the judges and two apparently were volunteers (RT 1448-1450, 1494, 1281).

B. The Testimony of the Judges.

The five superior court judges who participated in the selection of the 1971 grand jury were called by the defense and testified as follows:

Judge Samuel Gardiner:

Judge Gardiner was on the superior court bench from 1964 to 1972 (RT 921, 1033-1034) and was presiding judge when the 1971 grand jury was selected (RT 920-921). He indicated that the major problem that the judges had in selecting the grand jury was to find people willing to serve and interested enough to attend the committee meetings (RT 923). Accordingly, in 1971, the judges, for the first time sought to augment their own personal search for nominees

by seeking suggestions from civic organizations throughout the county (RT 923).

As presiding judge, Judge Gardiner on January 18, 1971 (RT 945), sent the list of nominees submitted by the organizations to his colleagues for their individual evaluation in preparation for their joint selection conferences (RT 943-944, 948, 969-970). Judge Gardiner also distributed names recommended to him from other non-organization sources (RT 945, 949-952).

Judge Gardiner's personal criteria in selecting grand jurors were to select persons (1) who were fair-minded and intelligent, and (2) who had a commitment to community service (RT 951). He knew personally only eight of the thirty nominees selected. Of these eight, he himself only nominated two (RT 951).

In addition to their personal criteria, Judge Gardiner also pointed out that the judges collectively sought to "spread the selection of grand jurors over the entire county and over each identifiable section of the county" (RT 954:1). They realized that it was impossible to have all elements of the county's 210,000 people represented in a panel of thirty. They nevertheless "tried to get a fair cross-section, old and young, male and female, black and white, rich and poor, people with a knowledge of each area of the county" (RT 956:2-11). Moreover, affirmative efforts were made by the judges to obtain black and labor representation, since members of these groups often indicated that they couldn't afford the time to serve (RT

954-955, 1064).[6] No person was excluded because low income would make it difficult for him to serve. In fact, earnings were not generally a factor in the selection process (RT 1062-1066).

Judge Gardiner himself contacted his "great many black friends" in the county, most of whom declined (RT 954). Judge Gardiner understood the law to be that there could be no systematic or intentional exclusion of an identifiable class of persons (RT 1019-1020). To him this meant the judges should affirmatively seek to ensure that all identifiable groups were represented, but not that they be given representation proportional to their population (RT 1020). However, according to Judge Gardiner, black persons were an exception in that they were proportionately overrepresented on the 1971 panel because of the judge's affirmative efforts (RT 1020, 1031-1032). Judge Gardiner himself had nominated five or six black persons during his eight years as a judge (RT 1091).

With regards to women, Judge Gardiner indicated that the judges estimated the female population of the county at 50 percent (RT 956). Twelve of the thirty nominees, or 40 percent, were women (RT 957).

As regards representation of persons under age 30, Judge Gardiner himself nominated one member of the panel who was in the young adult group (RT 958). He also joined in the selection of another panel mem-

[6]In 1970, for example, a black juror was obtained by the judges when PG&E, the juror's employer, agreed to make his time available without loss of wages (RT 1005-1006).

ber who was both under 30 (RT 964-965) and a member of a student organization (RT 967). Judge Gardiner had personal misgivings about the suitability of the latter nominee, but, nevertheless, joined in the selection because he believed that the young and students, even though of dissident views, should be represented (RT 964, 968, 997).

Judge Gardiner also testified that as far as he knew, the "Chicano" population of the county was very small (RT 1008-1017, 957). He didn't recognize any of the names on the panel of thirty as being "Chicano"[7] (RT 958) and he himself took no affirmative steps to find "Chicano" nominees (RT 1010-1011). Judge Gardiner explained that he did not believe "Chicanos" were an identifiable group in Marin County (RT 1022). Unlike the black community, which resided mainly in Marin City, there is no predominately Mexican-American area in the county (RT 1052-1053, 1082-1083). Rather, the group was largely assimilated or integrated and scattered throughout the county, was very small in number and had no organization in the county as far as Judge Gardiner knew. Judge Gardiner was a longtime resident of the county and had extensive political experience and contacts within the county, but had not come across any "Chicano" organizations (RT 1047-1048). Consequently, for this variety of reasons, he did not consider them

[7]The Court and counsel used the terms "Chicano," "Latino," and Mexican-American interchangeably (RT 1173-1174). Initially, this seemed to be as a matter of convenience (RT 1054-1056, 1269, 1296), but as will be seen, later produced considerable confusion and disagreement.

a cognizable group for purposes of potential grand jury nomination (RT 1027, 1048, 1083, 1086-1087).

Judge E. Warren McGuire:

Judge McGuire has been on the superior court bench since 1968 (RT 1113). Judge McGuire made it clear that 1971 was the first year that the judges solicited suggestions from the civic, social and political organizations in the county, as a means of obtaining a broader distribution and diversity of interests and groups from which to select nominees (RT 1120-1124). Judge McGuire's approach was to try to obtain representation from a broad range of groups by race, sex, age, occupation, etc. (RT 1126, 1134). The judges also consulted the telephone directory to expand the list of organizations (RT 1165). They were consciously making efforts to broaden the membership of the grand jury (RT 1202).

Based upon his knowledge and experience in the county, Judge McGuire did not believe that "Chicanos" were an identifiable group in the county (RT 1168, 1172-1173, 1249). He did not know of any organizations in the county composed primarily of "Chicanos" or which used the word "Chicano," "Mexican" or "Spanish" as part of its title (RT 1215). Similarly, Chinese and Japanese-American citizens were not very numerous and not considered to be "identifiable" for grand jury selection purposes by Judge McGuire (RT 1215-1216).

On the other hand, black citizens were deemed an identifiable group (RT 1215-1217). This was based

upon their numbers and their central location in Marin City (RT 1168, 1170-1171). Judge McGuire stated that geographical concentration would be one factor in determining whether a group was identifiable (RT 1169), but agreed it would not be a necessary pre-condition to identifiability (RT 1172). Affirmative efforts were made to include blacks (RT 1215).

No group was deliberately excluded and no one was excluded because he was under age 30, or because of his low income (RT 1217). In fact, affirmative efforts were made to include younger people (RT 1248) and various economic groups. In determining the economic status of potential nominees, the judges relied on occupation rather than on annual income or net worth (RT 1212-1213). Among the nominees Judge McGuire knew personally, were Manuel Silva, a bus driver, and Mrs. Clayton, a retired county employee (RT 1202, 1212).

Judge Henry J. Broderick:

Judge Broderick has been on the superior court bench since October, 1970 (RT 1255). He, like the other judges, was concerned about obtaining the widest possible diversity of people and points of view (RT 1257). The only racial group for which specific efforts were made to ensure representation was the county's black citizens (RT 1259). No other racial or ethnic group was specially considered (RT 1259). However, Judge Broderick stated that the judges did seek to obtain diverse representation based on age, sex and

geography and to some extent on economic status and education (RT 1259). The selectors' major problem, however, was that wage-earners and students did not have the time to spend on grand jury work. Nevertheless, affirmative efforts were made to ensure that these groups were represented (RT 1260). Judge Broderick pointed out that unwillingness to serve crossed racial and income lines and depended on such factors as devoting time to studies or family (RT 1305-1306).

Judge Broderick believed that youth should be represented on the grand jury because they had a somewhat different point of view than persons in older age groupings (RT 1259-1260, 1263-1267). The judge also pointed out that there was a great diversity of thinking within the younger age group, as well as among older persons, but agreed that the young could be characterized generally as being more liberal (RT 1265). No young person was excluded merely because of age, in fact the young were specifically included (RT 1329).

Judge Broderick also agreed that wage-earners should be represented on juries (RT 1274) and stated that affirmative efforts were made through labor unions to obtain wage-earner representation (RT 1275). No one was excluded by the judges because of poverty (RT 1315-1316) or economic status (RT 1328).

Judge Broderick also stated that he did not think Mexican-Americans were an identifiable group in Marin County (RT 1294). Judge Broderick under-

stood the term "identifiable group" for purposes of grand jury selection to refer to a substantial, significant segment of the community, such as the black citizens of Marin County. He did not believe any other ethnic group was similarly identifiable (RT 1295-1296). This, he explained, did not mean that other ethnic groups were excluded or had no opportunity to be considered. To the contrary, Judge Broderick pointed out that the selection process was designed to obtain a broad cross-section of diverse community groups regardless of whether they knew of any particular identifiable group (RT 1299-1301, 1322:27).

Judge Keating:

It was stipulated that Judge Keating's testimony would be cumulative of the other judges and that he would not be called as a witness (RT 1331-1332).

Judge Joseph Wilson:

Judge Wilson has been a Marin Superior Court Judge since 1965 (RT 1337). Together with his colleagues, he sought to select grand jurors who would represent a broad cross-section of interests and groups, in terms of age, sex, geography and occupation (RT 1350, 1434-1435). Special affirmative efforts were also made to ensure that there were black citizens on the panel (RT 1350). In fact, two blacks were on the 1971 member panel (RT 1378-1379). Judge Wilson himself sought to obtain representatives from both conservationist and commercial interests (RT 1350). He did not, however, suggest any

personal nominations of his own acquaintance (RT 1349).

No one was systematically excluded because of age (RT 1411), occupation (RT 1412) or low income (RT 1418). Indeed, the judges made a conscious effort to include young people under age 29 and students (RT 1344). Two College of Marin students, Beban and Reed, were selected (RT 1345-1346). At least four other persons under age 35 were considered (RT 1411).

To obtain wage earner or blue-collar worker representation no special efforts were made other than to solicit suggestions from local labor organizations (RT 1346-1348).

Judge Wilson considered blacks to be an identifiable group in Marin County for purposes of grand jury service (RT 1373). He knew that the black population of the county was between 2 and 3 percent (RT 1409)[8] but found that their geographical concentration in one area of the county (Marin City) was a factor in determining identifiability (RT 1377-1379). Another factor was Judge Wilson's belief that black citizens had a wide variety of common goals and interests (RT 1373, 1385), including several organizations (NAACP, CORE) (RT 1409). A third factor was the history of visible discrimination against blacks, notably in housing and jobs (RT 1424-1425).

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[8]The judges did not use the 1970 census figures when they were selecting the 1971 grand jury during the period from October, 1970 to April, 1971 (RT 1367-1368). The census was not issued until after October, 1971, and hence, was not available to the judges.

On the other hand, Judge Wilson did not believe that Mexican-Americans were an identifiable group in Marin County (RT 1366-1367, 1372-1373). Judge Wilson knew there were people with Spanish surnames in Marin County, but did not think they were very numerous (RT 1350-1351). Neither did he believe that there had been blatant, visible discrimination against Mexican-Americans in Marin County (RT 1413-1416). Unlike blacks, persons of Spanish surname, according to Judge Wilson, cover a fairly broad diversity of interests and concerns (RT 1373). Neither were Spanish surnamed persons geographically concentrated in the county (RT 1373). Judge Wilson, who like the other judges, had lived in Marin County for some twenty years, and was active politically, had not come across a single organization or club which was identifiable as a Spanish surname group by membership or title (RT 1408).[9] For these reasons, unlike black citizens, he did consider the Mexican-American or Spanish surname group identifiable for grand jury selection purposes.

C. The Population and the Panel Compared.

The trial court took judicial notice of, or admitted into evidence, pertinent portions of the 1970 federal census relative to the makeup of the Marin County population (RT 1426-1430, 1437-1438, 1467, 1577,

[9]Defense witnesses conceded that the largest "Chicano" organization in the county in 1973 was La Familia with only 100 members (RT 1915). That group was not in existence when the 1971 panel was selected, having been organized in mid-1971 with some twelve members (RT 1897, 1913, 1967). There was no "Chicano" or La Raza group at College of Marin in 1971 (RT 1916-1917).

1613). Also in evidence was a survey of the age, occupation, race and income profile of the 30 persons selected for the 1971 grand jury panel (Peo. Exh. E, RT 2520). Using the actual data revealed by the census and the survey, simple mathematical calculations were made to determine the population percentages of the four groups allegedly excluded, as compared to their representation on the 1971 grand jury panel, as follows:

(1) Black Citizens:

The 1970 population of Marin County was 206,038,[10] of whom 5,042[11] or 2.4% were black citizens.

Two of the 30 persons on the 1971 panel or 6.7% were black (RT 1275, 1379, 1570).

(2) Young Adults (age 21-29):

According to the census, there were 131,312 persons[12] in Marin County, age 21 or over. Of these, 28,919[13] or 22.0% were age 21-29.

Two of the 30 panel members (Messrs. Beban and Graves), or 6.7 percent, were age 29 or under when they were selected (RT 2510, Def. Exh. 2, RT 852, 871, CT 239).

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[10]1970 Census (California) p. 6-1034. Hereafter, all census references are to the census for California, unless otherwise indicated.

[11]1970 Census, p. 6-310.

[12]1970 Census, p. 6-318.

[13]1970 Census, p. 6-318. To obtain the correct figure for age 21-29, we added the figures for age 20-24 and age 25-29 and then subtracted the figure for age 20.

(3) Low Wage Blue-Collar Workers:

(a) Blue-Collar:

From the evidence in the record, the composition of the class "low wage blue-collar workers" is not at all clear. The trial court made no express findings defining the group, but simply utilized that label. Both defense and prosecution sociologists testified (RT 1667-1668, 2070) that blue-collar workers can, as a general proposition, include the following occupations listed in the census for Marin County:

Crafstmen (including foremen	7,229
Operatives	4,382
Transport Operatives	1,573
Laborers	2,400
Farm	371
Service	8,160
	24,115

White collar workers include the following occupations:

Professional, technical	19,598
Managers	12,010
Sales	9,247
Clerical	15,945
	56,780

(RT 1667-1668, 2070).[14]

However, the median annual earnings of the blue-collar craftsmen group ($10,100.00) is closer to the income of the white-collar professional-managerial class ($14,100.00) than to blue-collar laborers and opera-

[14]1970 Census, p. 6-1049.

tives ($4,500.00-$7,400.00). On the other hand, white-collar clerical workers had median earnings of only $5,200.00.[15]

The total number of persons age 16 or over employed in Marin County is 80,620.[16] The blue-collar groups listed above total 24,115 or 29.9% of the total. Since the census uses age 16 and over in analyzing these occupations, correction for age 16-20 is necessary since the grand juror eligibility age is 21. An expert witness estimated that such a correction would disclose that 25% of the county's employed population over age 21 fell into the above listed blue-collar occupations (RT 2090-2092). This figure seems not to be in dispute (RT 2164-2165).

On the panel, it would appear that three of the 30 members of the panel, or ten percent, fell within the blue-collar occupations listed in the census. We refer to Mr. Silva, a bus driver, Mr. Tibbott, a retired printer and Mr. DeVore, a supervisor at Western Electric Company, hence a foreman within the craft blue-collar group (Peo. Exh. E).[17] However, the record states that 17 of the 30 members of the panel were employed (RT 2094-2097). Thus, the 3 blue-collar members constitute about 17.6% of the employed panel members compared to 25% blue-collar in the over 21 employed population.

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[15]1970 Census, p. 6-1049 bottom.

[16]1970 Census, p. 6-1049 top.

[17]Petitioners claim that the record shows that there was only one blue-collar worker on the panel, the bus driver Mr. Silva (Pet. 10).

(b) Low Income:

If income rather than occupation is looked to as the more relevant and more precise means of defining the economic class, the record discloses that six, or 20%, of the 30 panel members reported annual family incomes of less than $9,000.00 (RT 2510-2511, 2517, 2520, Peo. Exh. E). The census shows that of Marin County's 51,912 families, 12,664, or 24 percent, had incomes of $9,000.00 or less.[18]

(4) Latin Americans:

The census contains no population data for such groups as Latin Americans, Latinos, Chicanos or Mexican Americans. For California, census figures are presented for persons of Spanish language and all *other* persons of Spanish surname. Of Marin County's 206,038 persons, 8,530, or 4.1 percent are "Persons of Spanish language", and 3,491, or 1.7 percent, are in the group "Other persons of Spanish surname".[19]

The petitioners' claim of discrimination is based on their assumption that the total of the "Spanish language" and "Other Spanish surname" groups, 12,021 persons, or 5.8 per cent of the county population, is the number of "Chicanos" or "Latin Americans" in the county. That assumption was never factually established. There was no evidence presented either in the

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[18] 1970 Census, p. 6-1059.

[19] 1970 Census, p. 6-1034. As defined by the census, "Persons of Spanish language comprise persons of Spanish mother tongue and all other persons in families in which the head or wife reported Spanish as his or her mother tongue." 1970 Census, App. p. 10. "[P]ersons with Spanish surnames were identified by means of a list of over 8,000 Spanish surnames originally compiled by the Immigration and Naturalization service." 1970 Census, App. p. 10.

form of census definitions or by way of expert testimony from a sociologist that all persons of the Spanish language and other Spanish surname groups were Chicanos.[20]

Mindful of this omission, counsel for petitioner Talamantez, the only Mexican-American among petitioners, was permitted to reopen his case eight days after the close of the evidentiary hearing to present additional evidence. Ms. Theller, a social worker for a local anti-poverty agency, testified that "Chicanos" and Mexican-Americans were considered one and the same by her agency (RT 2745-2746). She also indicated initially that many of the approximately 8,000 Spanish language persons in the county were "Chicanos" or Mexican-Americans (RT 2746-2750). However, she subsequently admitted that her definition of "Chicano" also included persons born in Central America (RT 2746-2747). Upon cross-examination, Ms. Theller could verify only that an estimated 3,000 of the 8,000 Spanish language persons were actually Mexican-Americans (RT 2750). She also conceded that she had no knowledge of the national origin or heritage of any of the other 5,000 or so Spanish language persons in the county, that they could be from Spain, or any other country, rather than of Mexican heritage (RT 2752). At least one of the petitioners accepts 3,000 as the number of Mexican-Americans in Marin County (CT 262:29). This is only 1.5% of the population.

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[20]We point out, for example, that under the census, if the head of household is either Spanish surname or Spanish language, the entire family is so counted even though the spouse and children may not themselves be within that group.

Further, there is expert testimony of sociologist Scott that in the San Francisco Bay Area which includes Marin County, a Spanish surname was not a very reliable guide to "Chicano" origins (RT 2243-2244, 2478). Other groups in this area, particularly Filipinos (RT 2478), and Portuguese (RT 2614), bear surnames which appear on the census list of "Spanish" surnames. Doctor Scott defined "Chicano" as a person who was born or whose parents were born in Mexico (RT 2138). He stated that, unlike the Bay Area, most Spanish surnamed persons in the central valley area of California were "Chicano" (RT 2276). Doctor Scott's observations regarding Mexican-Americans appear to be uncontradicted.

Dr. Scott's opinion is supported by the census. In the separate 1970 census volume entitled *Persons of Spanish Origin* (i.e. persons who report their place of origin or descent as either Mexico, Cuba, Puerto Rico, Central America, South America, or other Spanish), the Fresno metropolitan area [a central valley locale] listed 93,502 persons of Spanish origin, of whom 86,135 (or 92%) were of Mexican origin. By contrast, the San Francisco-Oakland metropolitan region which includes Marin County listed 231,453 persons of Spanish origin of whom only 118,056 (or 51%) were of Mexican descent.[21]

We point out also that the 3,491 persons in the class "Other Persons of Spanish surname" are persons who are not within the Spanish language (or mother

[21] 1970 Census (Span. Orig.) p. 154.

(tongue) group. This may well reflect those persons of Portuguese descent who reside in Marin County whose surnames (e.g. Silva) appear on the census list of "Spanish" surnames. Unfortunately, the 1970 census contains no data for persons of Portuguese origin. However, the 1960 census does contain such data, at least as to persons of foreign stock. In 1960, 1,305 persons in Marin County are listed as being of Portuguese stock, only 1,218 are listed as being of Mexican stock.[23] The 1970 census shows 1,366 persons of foreign stock from Mexico in Marin County.[23] By interpolation for 1970, it may well be that Portuguese stock persons outnumber persons of Mexican stock. This supports our view that the Spanish surname group in Marin County may well be predominantly Portuguese, not Mexican-American.

Neither does the census show that all of the 8,530 Spanish language persons have Spanish surnames. Indeed, the very opposite is true—nearly ⅔ (5,682) of the Spanish language group do not have Spanish surnames. Only 2,848 Spanish language persons in Marin County have Spanish surnames.[24] These facts bespeak a substantial degree of intermarriage, assimilation and integration among Marin County's group of "Spanish language" residents.

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[22]1960 Census (California), p. 6-447.

[23]1970 Census, p. 6-1034.

[24]Our data is based on the 1970 census separate volume entitled, *Persons of Spanish Surname* (p. 117) which reveals that there are 6,339 persons (3.1%) with Spanish surnames in Marin County. Since 3,491 of these are in the general census category, "other persons of Spanish surname", the remainder, only 2,848, must be Spanish language.

To further illustrate the problem of identifiability, we note that yet another census category "Persons of Spanish origin" reveals that there are 5,781 such persons in Marin County, or 2.8% of the total population.[25] But this category is by definition over-inclusive in that it covers persons whose origins are as diverse as Mexico, Cuba, Puerto Rico, Central and South America and other Spanish areas.

As for representation on the 1971 grand jury panel, it is conceded that there were no "Chicanos" selected (RT 2625). But, it is also undisputed that three of the thirty persons, or 10%, on the panel had surnames which appeared on the census list of Spanish surnames (Peo. Exh. F; RT 2598): Mr. Silva, Mr. Raab and Mr. Marcus (RT 2593, 2615-2622).[26] As previously noted there are 6,339 Spanish surnamed persons in Marin County (1970 census, Spanish surnames) or 3.1%.

The People offered to prove that two of the thirty-member panel, or 6.7%, were Spanish language: Mrs. LaBelle and Mr. Dolan (RT 2770; CT 232-233, RT 2761-2768).[27] The trial court refused to admit the People's proffered evidence (RT 2768-2769), stating:

> "I hope the appellate court doesn't send it back because we didn't take this testimony" (RT 2769: 7-8).

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[25]1970 Census, p. 1034.

[26]Parenthetically, it seems that Mr. Marcus' father was born in Spain (CT 232-233) and that the name Silva is Portuguese (RT 2595, 2614).

[27]Dolan's wife and children speak Spanish. She was born in Bogota, Columbia. Mrs. LaBelle's father was born in El Salvador. Spanish was spoken in her home (CT 232-233).

The census lists the Spanish language population of the county at approximately 8,530 or about 4.1 percent.

D. Prior Grand Jury Panels (1962-1970).

Except for a presentation of a list of the 211 names of the persons who were on the grand jury panels from 1962 to 1970 (RT 2522-2525; Def. Exh. 39), the petitioners introduced no material evidence of the composition of such prior panels or any comparative population data for prior years. When the People attempted to introduce evidence from prior years petitioners objected and the trial court, we believe, erroneously refused to admit it (RT 900-901).

If evidence of prior years had been admitted, the prosecution would have been able to show that blacks have been fairly represented on all Marin County panels since 1962. Such evidence was admitted without objection in the case of *People v. Angela Y. Davis,* No. 3744 in the files of Marin County Superior Court. We ask this Court to take judicial notice thereof. Cal. Evid. Code § 459. (See, Declaration of Edmar D. Hicks attached hereto as Appendix A). The affidavit shows that since 1962, blacks have comprised 5.5% of those selected for grand jury service; as compared to only 2.5% of the Marin County population. This is neither exclusion nor tokenism—it is fair and often over representation.

Moreover, when the census list of 8,000 Spanish surnames is compared to the defense list of names on

the 1962-1970 panels, eight names[28] or 3.8% are Spanish surname. According to the 1960 census, the Spanish surname population of Marin County was 5,634 or 3.8% (1960 census, Vol. II, p. 195).

E. Defendants' Standing.

Defendants Spain, Tate, Drumgo and Johnson are black Americans (RT 1641, 2568, 2530, 2550). Mr. Talamantez is Mexican-American (RT 1974).[29] Mr. Pinell is a black and brown citizen of Nicaragua (RT 1862-1864). The defendants are all age 30 or below

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[28]The names are: Barbier, Oram, Vargas, Marcus, Cassa, Barron, Ferrarese, and Silva.

[29]In California, "it is . . . an essential part of the challenges to the panel, that a defendant bring himself . . . within the class concerning which he is complaining." *Ganz v. Justice Court*, 273 Cal. App.2d 612, 620 (1969). *Accord, People v. White*, 43 Cal.2d 740, 753 (1954); *People v. Schader*, 71 Cal.2d 761, 784 (1969). *In re Wells*, 20 Cal.App.3d 640, 649 (1971).

If the accused cannot show membership in the excluded class, he must show prejudice directly resulting from the asserted discrimination. *People v. Sirhan*, 7 Cal.3d 710, 753 (1972); *Allen v. State*, 137 S.E.2d 711 (Ga. Ct. App. 1964).

> "[I]f the defendant is a member of the class excluded the danger of prejudice is great enough so that we will condemn the exclusion without looking for actual prejudice; but if he is not a member of the excluded . . . class the danger is not great, and before we will condemn the exclusion . . . we must find that the defendants were actually prejudiced." SCOTT, *The Supreme Court's Control Over State and Federal Juries*, 34 Iowa L.Rev. 577, 584 (1949).

All defendants, except Talamantez, a "Chicano," are black persons. No evidence of actual prejudice was offered. Hence, the black defendants cannot assert discrimination against "Chicanos," and Talamantez cannot assert bias against blacks. This defect in proof is not cured by the holding of *Peters v. Kiff*, 407 U.S. 493 (1972): an accused need not show standing to assert race discrimination in the selection of grand or petit jurors. *Id.* at 504, 507. *Peters v. Kiff* governs criminal proceedings "instituted" after June 22, 1972, the date of that decision. *People v. Sirhan, supra*, 7 Cal.3d at 754. Since defendants were indicted on October 1, 1971, the unabridged standing requirement forecloses their claims with respect to the exclusion of persons or groups other than their own.

(RT 1623, 2567, 1862, 2549, 2529, 1947). All are felons and prison inmates with low or no income.

ARGUMENT

THERE WAS NO EVIDENCE OF DELIBERATE DISCRIMINATION AND THE UNDISPUTED EVIDENCE SHOWS THAT THE 1971 MARIN COUNTY GRAND JURY PANEL WAS COMPOSED OF A FAIR CROSS-SECTION OF THE COUNTY SELECTED BY THE SUPERIOR COURT JUDGES WHO DID MORE THAN THE FOURTEENTH AMENDMENT REQUIRED BY MAKING AFFIRMATIVE EFFORTS TO ENSURE FAIR REPRESENTATION FOR ALL COGNIZABLE GROUPS IN THE COUNTY.

It is settled law that a criminal conviction cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury which has been selected in a manner which deliberately and systematically discriminates against any citizen by reason of his race, national origin, sex or other constitutionally cognizable status. *Alexander v. Louisiana,* 405 U.S. 625, 628-629 (1972); *also see Hernandez v. Texas,* 347 U.S. 475 (1954); *Hoyt v. Florida,* 368 U.S. 57 (1961); *Swain v. Alabama,* 380 U.S. 202, 203-205, 209 (1965). However, "[N]either the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group." *Swain v. Alabama, supra,* 380 U.S. at 208. "A jury system exactly reflecting the black-white population of a community could be helter-skelter on the basis of economic, educational, social and job status." *United States v. Hyde,* 448 F.2d 815, 825-826 (5th Cir. 1971); *accord Fay v. New York,* 332 U.S. 261, 284-286, 291 (1946).

Moreover, systematic discrimination must be shown to have existed over "an extended period of time." *Hernandez v. Texas*, 347 U.S. 475, 480 (1954); *Swain v. Alabama, supra*, 380 U.S. at 227. Here, the petitioners presented no evidence regarding prior years.

"[P]urposeful discrimination may not be assumed or merely asserted . . . . It must be proven." *Swain v. Alabama, supra*, 380 U.S. at 205. "The burden of proof is on the defendants to establish a prima facie case of invidious discrimination." *Whitus v. Georgia*, 385 U.S. 545, 550 (1967); *Hernandez v. Texas, supra*, 347 U.S. at 480.

Here, the defendants did not carry this burden of proof. Deliberate discrimination was neither alleged nor shown either in the form of total exclusion or token limitation on the part of the selectors. *Cf. Cassell v. Texas*, 339 U.S. 282 (1950). Rather, petitioners rely solely on an allegation of statistical underrepresentation for a single year.

Of course, the omission by the petitioners of data from prior years is not surprising. By means of judicial notice of Appendix A, it will be apparent to this Court that one of the groups found discriminated against, namely Marin County's black citizens, have in fact been fairly represented or overrepresented on every grand jury panel since 1962.

Moreover, the testimony of all of the judges, called as witnesses for the defense constitutes positive, undisputed proof that no deliberate discrimination was practiced against any person or group by reason of

race (RT 1350), age (RT 1251, 1329, 1411), poverty, income or economic status (RT 1062-1066, 1217, 1315-1316, 1328, 1418) or ethnic background (RT 1217, 1299-1301). The judges thus denied deliberate discrimination and that denial is undisputed.

We submit, therefore, that this testimony alone justifies denial of certiorari. For, while it may be true that conclusionary affirmations of good faith and denials of deliberate discrimination are insufficient *alone* to dispel or explain a prima facie case of systematic deliberate discrimination *(Turner v. Fouche,* 396 U.S. 346, 360-361 [1970], that principle is not applicable here for two reasons.

First, no prima facie case of discrimination against blacks, blue-collar workers or young adults was determined to have been established at the hearing (RT 2603). Hence, the burden had not shifted to the selectors to explain or dispel; no discrimination having been found. See, *e.g., United States v. Hyde, supra,* 448 F.2d at 825-826. The trial court ultimately ruled as to these groups without allowing the people to present evidence, an error which was corrected by the reversal on appeal.

Second, and more significantly, the selectors' testimony was not merely conclusionary affirmations of non-discrimination. The judge's testimony presented a detailed description of their selection practices, their mental processes and understanding of their duties, which was exhaustively examined by counsel for all parties. That testimony constitutes undisputed evidence negating any inference of deliberate exclusion

for not only was deliberate exclusion denied, there was in fact affirmative action to include persons from all cognizable groups in the county.

Specifically, the testimony of the judges is that they made affirmative efforts, individually and collectively, to obtain "a fair cross-section, old and young, male and female, black and white, rich and poor, people with a knowledge of each area of the county" (RT 956:2-11 [Gardiner, J.]; *accord,* RT 1126, 1134 [McGuire, J.], RT 1259 [Broderick, J.]; RT 1350, 1434-1435 [Wilson, J.]. To the judges this meant that they should seek to obtain representation from the various cognizable groups in the county, but not to provide proportional representation (RT 1020, 1260). According to the judges' undisputed testimony affirmative efforts were made to insure fair representation from labor (RT 954-995), wage-earners (RT 1064, 1260, 1274, 1275), women (RT 964), young persons, including students (RT 964, 1260, 1344), conservation groups (RT 1350) and the black community (RT 954-955, 1346-1348, 1350).

The record thus supports a conclusion: (1) that the means used by the selectors were designed to insure fair representation of all cognizable groups, and (2) that the selectors went beyond their own wide circle of friends and personal acquaintances and solicited suggestions from numerous community groups and individuals in order to insure a broader cross-section (CT 73-74). Further, the composition of the panel compared to the eligible population of the county reveals that the judges' efforts were largely

successful or provide a constitutionally acceptable explanation for any disparity as follows:

1. Black Persons.

First, there were two black persons on the panel of thirty in 1971. This is 6.7%. The black population of the county is only 2.4%. Hence, as several of the judges pointed out, blacks were overrepresented in 1971 (RT 1020, 1031-1032) as was true in the previous nine years. Petitioners state that the two blacks on the 1971 panel had incomes higher than that of the average black citizen. They omit evidence from past years that the judges made arrangements with a black wage-earner's employer to obtain his services on the grand jury (RT 1005-1006). In any event, petitioners have no right to a panel "tailored" to their own circumstances. *Hoyt v. Florida, supra,* 368 U.S. at 59; *People v. Newton,* 87 Cal.Rptr. 394 [8 Cal.App.3d 359, 390-391] (1970).

2. Persons with Spanish Surnames; Spanish Language Persons; Mexican-Americans; Latin Americans.

All of the judges candidly testified that they did not consider Mexican-Americans or "Chicanos" to be a constitutionally cognizable group in Marin County for purposes of grand jury representation (RT 1047-1048, 1167, 1972, 1249, 1294, 1367, 1407-1408). In essence, they all were of the view that Mexican-Americans were not sufficiently numerous or otherwise identifiable in 1971, there being no geographic concentration of Mexican-Americans in the county (RT 1013-1016), no Mexican-American organizations in the county (RT

1215, 1408-1409), and no outward, visible manifestation of discrimination against Mexican-Americans (RT 1412-1416). All of the judges based their views on their longstanding residence in the county and the broad knowledge thereof developed in the course of their participation in legal and political affairs (RT 1013-1016, 1299-1300, 1168, 1172-1174, 1408).

It is true, however, that several non-expert witnesses for the defense testified in conclusionary terms that "Mexican-Americans or Chicanos" were an identifiable group in Marin County (RT 1897, 1961, 1981, 1995-1998). Their testimony was based on their assumption that the 12,000 Spanish language plus other Spanish surnamed persons in the county were "Chicanos", an assumption which was never proven. The defense witnesses were not experts in sociology, demography or statistics. They were primarily lay persons of Mexican-American heritage. Their testimony displayed a certain lack of knowledge of the facts underlying their conclusion. For example, Mrs. Hicks, who had been in Marin County for less than a year (RT 1962:21-22), believed that most members of the "identifiable" group were blue-collar workers (RT 1969-1970) whose average annual income was between $5,000 and $6,000 (RT 1977). Yet, census shows that Marin's Spanish language-surname group was mostly white-collar whose average income was $13,826 (1970 census, p. 6-1096; RT 2002, 2026-2028). Neither Mr. Gallardo nor Ms. Wallace could supply evidence of specific instances of job or housing discrimination in Marin County (RT 1903, 1927-1929, 2002-2003, 2021-2028).

Mr. Gallardo and Ms. Estrada conceded that many Mexican-Americans in the county had assimilated into the general population (RT 1922-1924, 1981, 2000). These same witnesses also confirmed the judges' testimony that in 1970-1971 when the panel was selected, there were no Mexican-American organizations in Marin County (RT 1913-1916), that Mexican-Americans were not geographically concentrated (RT 1907) and not a visible minority (RT 1965, 2004). This is consistent with the testimony of the judges that they did not consider "Chicanos" an identifiable group in Marin County.

In any event, evidence was introduced that three of the thirty panel members had surnames which are classified as Spanish surnames by the 1970 census (RT 2614-2620). This is 10 percent. According to the census, some 6,339 Marin residents are classified as persons of Spanish surnames. This is only 3.1%. Hence, by this undisputed evidence, we would submit that persons of Spanish surname were more than fairly represented.

There are some 8,000 Spanish language persons in Marin County. One non-expert witness estimated that 3,000 of these were Mexican-American (RT 2750-2751). This is the only evidence as to the number of Mexican-Americans in Marin County (RT 2618:21-29). Since it is only an estimate its accuracy is questionable. The actual figure could well be considerably lower. However, since it is undisputed we accept it. Thus, Spanish language persons constitute about 4.1 percent of the county population and Mexican-

Americans constitute only 1.5 percent of the county population. The prosecution offered to prove that two of the thirty panel members in 1971, or 6.7% fell within the Spanish language category defined by the census (RT 2770, 2761-2768; CT 232-233). The trial court ruled that the People would not be able to present this evidence (RT 2768-2770:12). The Court ruled that the hearing had been reconvened only to allow the defense to reopen its case (RT 2768-2769:2, 2738:17-21) and cryptically remarked:

> "I hope the appellate court doesn't send it back because we didn't take this testimony."
> (RT 2769:7).

Petitioners have not, however, challenged the truth of the offer. If it is accepted as true, then Spanish language residents of Marin County were more than fairly represented on the panel (6.7% panel: 4.1% population). At all events, there was no evidence presented nor have petitioners alleged that Spanish language persons, as such, were a distinct, constitutionally cognizable group (CT 206, 262, 278-279, 287-288). Indeed, defense witness Theller conceded that the Spanish language group included persons from the Philippines (RT 2749:2), Spain (RT 2752:11) or from any other country (RT 2752). It will also be recalled that 5,682 of Marin's 8,530 Spanish language residents do not have Spanish surnames.

As regards Mexican-Americans (or Chicanos), the undisputed evidence shows that this group, which consists of no more than 3,000 persons (or 1.5%), is not sufficiently numerous in Marin County to be con-

sidered constitutionally cognizable for grand jury service. As a proportional matter, the group would be entitled to less than one-half of one person representation on a panel of thirty. We submit that the conceded absence (RT 2625) of such a small group in a single year is of no constitutional significance. See, *United States v. Whitley,* 491 F.2d 1248, 1249 (8th Cir. 1974); *Smith v. Yeager,* 465 F.2d 272, 279 n. 18 (3rd Cir. 1972); *see also, Swain v. Alabama, supra.*

3. Young Adults (age 21-29).

It is the People's position that age group 21-29 is not a constitutionally cognizable class. Nearly all federal courts have refused to impose age standards upon grand jury selectors. For, unlike racial discrimination, age discrimination does not forever exclude any citizen from grand jury service. In a recent decision, the District of Columbia Circuit states:

> "With the exception of *United States v. Butera,* 420 F.2d 564 (1st Cir. 1970), all federal courts, both at the trial level and at the circuit level, have held that the category of 'young persons' is not a cognizable class that must be systematically mirrored in jury selection procedures." *United States v. Greene,* 489 F.2d 1145, 1149 (D.C. Cir. 1973).

Accord, United States ex rel. Chestnut v. Criminal Court of City of New York, 442 F.2d 611 (2nd Cir. 1971) [approving a minimum age requirement of 35 years]; *United States v. Guzman,* 337 F.Supp. 140 (S.D.N.Y. (1972), *affirmed,* 468 F.2d 1245, 1247 (2nd

Cir. 1973); *United States v. DiTommaso*, 405 F.2d 385, 391 (4th Cir. 1968); *United States v. Kuhn*, 441 F.2d 179, 181 (5th Cir. 1971); *United States v. Gargan*, 314 F.Supp. 414, 417 (W.D. Wis. 1970), *affirmed sub. nom. United States v. Gast*, 457 F.2d 141 (7th Cir. 1972); *United States v. Ross*, 468 F.2d 1213 (9th Cir. 1973).

Moreover, even the First Circuit has retreated somewhat from its position in *Butera*. See, *United States v. Camara*, 451 F.2d 1122, 1125-1126 (1st Cir. 1971).

Expert testimony (including that provided herein)[30] regarding the "generation gap," or the "condition of youth" is "little more than an elaborately developed statement of the obvious." *United States v. Gargan, supra*, 314 F.Supp. at 416-417. The testimony herein did not, as it must, show that "with specific reference to the function of a grand jury, the age group . . . is . . . an identifiable class." *Ibid. Accord, United States v. Ross, supra*, 468 F.2d at 217 (rejecting expert testimony as unpersuasive).

> "Classification of persons on a decennial age basis may well be significant for certain purposes, but it is certainly not required as as underlying jury selector principle." *United States v. Cohen,*

[30]Defense sociologist Doctor Blauner testified that young adults shared a liberal outlook or point of view not in common with older persons (RT 1661-1665). Doctor Scott disagreed, stating that while young people had shared attitudes regarding specific issues pertinent to them (the draft, auto insurance, legalizing marijuana, etc.), they did not share such a common outlook regarding the primary functions of the grand jury (RT 2058-2061, 2068, 2117-2120, 2417-2418, 2422). Doctor Blauner did agree that there were many issues upon which the young were divided (RT 1662).

275 F.Supp. 724, 740 (D.Md. 1967); *affirmed sub. nom. United States v. DiTommaso, supra.*

> "We regard it as highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a few years older, or a few years younger." *King v. United States,* 346 F.2d 123, 124 (1st Cir. 1965).

In *Butera,* age group 21-34 was recognized as the young adult class. This was not, however, a constitutional principle. The First Circuit avowedly exercised its supervisory powers over inferior federal courts to impose a requirement more rigorous than demanded by the Constitution. 402 F.2d at 567, n. 2, 568, n. 7, 570. Yet, two days before *Butera* was decided, this Court held in *Carter v. Jury Commission,* 396 U.S. 320 (1970):

> "It has long been accepted that the Constitution does not forbid the states to prescribe relevant qualifications for their jurors. The states remain free to confine the selection . . . to persons meeting specified qualifications of *age* and educational *attainment* . . . ." 396 U.S. at 332.

Approval was noted of state statutes requiring jurors to be age 25. *Id.* at 333, n. 29.

Although in the printed reports *Butera* cites *Carter* (420 F.2d at 567, n. 5), the First Circuit original slip opinion contains no reference to *Carter.* This fact may well explain the basic inconsistency in the two opinions. We submit that *Carter,* not *Butera,* controls here. The young are not a cognizable group as a matter of constitutional law.

In any event, even if young adults, age 21 to 29, are assumed, *arguendo*, to be a cognizable group, the record does not reveal any deliberate discrimination against persons of that group. Indeed, deliberate discrimination against the young is not alleged. As long as there is no deliberate exclusion, underrepresentation of young adults does not violate the Constitution. *Hamling v. United States, supra,* 418 U.S. 137-138; *United States v. Greene, supra; United States v. Gargan, supra; United States v. DiTommaso, supra.*

But that is not all. The record reveals that the selectors made affirmative efforts to obtain representation of young adults including students for the panel. They were successful in finding and selecting Mr. Beban, age 23, a College of Marin student, and Mr. Graves, age 29 (RT 1575-1576; Def. Exh. 2; RT 2520; Peo. Exh. E). This is about 7 percent of the panel. It is true that 22 percent of the over age 21 eligible population in Marin are age 21-29.[31] There is,

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[31]The petitioners offered the testimony of Doctor Sperlich, an expert in probability or statistical decision theory (RT 1766). See, FINKELSTEIN, *"The Application of Statistical Decision Theory to Jury Discrimination Cases,"* 80 Harv. L.R. 338 (1966). As to youth, for example, Sperlich found that only in six chances in 1,000 would a panel of thirty nominees have only two members in age group 18-29 if selected at random (RT 1770, 1776, 1802). To Doctor Sperlich a result of one chance in 100 would not have been statistically significant to show discrimination (RT 1775, 1804-1805). Since his result was six in 100, it was his opinion that the selection process was not random (RT 1826-1827) and biased against youth (RT 1776:5). However, in 1971, 18-20 year olds were not eligible by statute. Pen. Code § 893. Hence, Doctor Sperlich's calculation is of no probative value (RT 1789, 1803). The People's expert, Doctor Scott, did compute the probability of two of thirty on the panel in age group 21-29 and found the random chance of such a result is greater than one in 100, and, hence, not statistically significant to show bias according to Doctor Sperlich (RT 1775;

moreover, a constitutionally acceptable explanation for this disparity, which is not only common knowledge and judicially noticeable, but was also so testified to by the judges herein. Namely, many young men are unable or unwilling to serve due to the demands of military service, college studies and family obligations and many young women are in school or at home caring for infants. *United States v. DiTommaso, supra; United States v. Butera, supra.* Indeed, the disparity was much greater in *Butera* (65 in pool, 238 if proportional, or almost a 4:1 disparity) and similar explanations were found acceptable. In this case, we doubt that such explanation is even required since the judges undisputedly made affirmative efforts to include the young. Such evidence negates discrimination as a matter of law.

4. Low Wage Blue-Collar Workers.

From the testimony presented, the makeup of the group "low wage blue-collar workers" is not at all clear. No findings thereon were made by the trial court. It seems to include a rather well-paid group of craftsmen; but does not include clerical workers, a relatively lower paid group, mostly female, which is considered white-collar.

Doctor Blauner testified generally that blue-collar workers comprised a group which shared common at-

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1804-1805). In any event, though probability theory may show whether a panel has been selected randomly or not, it does not determine whether there has been bias in the selection process. The courts have uniformly rejected efforts such as Doctor Sperlich's to equate a non-random procedure with discrimination. See, *e.g., Stephens v. Cox*, 449 F.2d 657, 660 n. 8 (4th Cir. 1971); *cf, Carter v. Jury Commission, supra.*

titudes (RT 1669-1670). However, Doctor Scott pointed out that the attitudes of blue-collar workers varied primarily with their income and also their particular trade (RT 1711, 2075-2077). Both agreed that the blue-collar group tended to be more conservative on civil liberties issues than white-collar groups, while the latter tended to be the more conservative on economic issues (RT 1744-1746, 2079, 2108, 2111, 2121-2122, 2350). No showing was made that this group shared a common outlook with respect to the functions of the grand jury. Since the group is overinclusive in terms of income and occupation, we doubt any such showing could be made. We submit therefore that low wage blue-collar workers are not a cognizable class for grand jury service. *Quadra v. Superior Court, supra,* 378 F.Supp. at 621.

In any event, blue-collar workers were fairly represented on the panel. As noted, 25 percent of Marin County's 80,000 employed persons over age 21 are "blue-collar". Seventeen of the thirty members of the panel are employed.[32] If blue-collar workers were proportionally represented they would thus be entitled to four members. In fact, there were three: Mr. Silva, a bus driver, Mr. Tibbott, a printer, and Mr. DeVore, a supervising electrician.[33]

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[32]Since the total over age 21 Marin County population is about 130,000, of whom 80,000 or 60 percent are employed, [1970 census, p. 6-318, 6-1049] the fact that seventeen of the panel of thirty or 57 percent are employed, is just about right.

[33]Dr. Sperlich's probability theory calculations as to blue-collar workers was based on only one such person being on the panel of 30 (RT 1777). There were three. He found only a 5 in 100 million chance of their being 1 in 30. However, his population figures were

In the absence of deliberate exclusion, such substantial representation suffices. *Cf., Fay v. New York, supra.* No showing as to prior years was made. Moreover, the judges all testified that they did not discriminate on the basis of occupation or economic status, but rather affirmatively sought to obtain broad representation of various occupations. Moreover, there was a constitutionally acceptable explanation for the disparity. Namely, obligations of family support and time on the job made members of such groups proportionately more unwilling or unavailable to serve.

It is more significant, however, to look at income groupings since these can be more precisely defined by reference to the census. It will be recalled that 24 percent of the families in Marin County reported incomes of $9,000 or less. On the 1971 panel, six persons or 20 percent reported incomes of $9,000 or less (Peo. Exh. E). This is fair and substantial, representation of low income persons. But, even if there were a substantial disparity showing significant underrepresentation, this would not support a finding of discrimination, since the judges made affirmative efforts to include a broad range of persons of different income, occupation and economic status.

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based on blue-collar occupations amounting to 49 percent of the population (RT 1777) when in fact it was only 25 percent. Hence, the probative value of Dr. Sperlich's calculation is doubtful.

CONCLUSION

We respectfully submit that the California Court of Appeal correctly ruled that the 1971 grand jury panel in Marin County was selected in a constitutionally permissible manner based on undisputed evidence of affirmative efforts by the selectors to obtain a fair cross-section of the county on the panel and constitutionally acceptable explanations for any statistical imbalance. There was no evidence of deliberate discrimination and no evidence of discrimination in past years.

For the above reasons, we respectfully request that the petition for writ of certiorari be denied.

Dated, May 27, 1975.

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(Appendix A Follows)

Appendix A

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In the Superior Court
of the State of California
for the County of Marin

No. 3744

The People of the State of California,
Plaintiff,
vs.
Angela Y. Davis and Ruchell Magee,
Defendants.

DECLARATION OF EDMAR D. HICKS

State of California
County of Marin—ss.

Edmar D. Hicks, under penalty of perjury, declares that:

1. I am a supervisor in the Office of the County Clerk of Marin County; I have been employed in that Office from 1962 until the present.

2. Since 1964 I have performed clerical duties and maintained records for Marin County grand juries. In the course of my employment I have observed the grand jury nominees convene for the random selection of the new grand jury. I am personally acquainted with a number of grand jury nominees over the past years.

3. Based upon my personal knowledge and observation, and upon records maintained in the Marin County Clerk's Office listing the total number of nominees for each year and their respective addresses, I declare that at least the following black persons were nominated in the listed years:

Year	Total Nominees	Black Nominees
1970	30	1. Mr. Clarence Hebert 719 Drake Avenue Marin City, California
1969	29	1. Mrs. Juanita S. Cobb 31 Burgess Court Marin City, California
		2. Mr. Ellie H. Johnson 31 Buckelew Street Marin City, California
1968	26	1. Mrs. Orpha E. Barnes 85 Buckelew Street Marin City, California
		2. Mr. Harold Jackson 30 Locust Street Larkspur, California
		3. Mrs. Dorothea Mitchell 14 Dutton Court Marin City, California
1967	27	1. Mr. Alvis Allen 49 Cole Drive Marin City, California
		2. Mr. Arthur Miller, Jr. 89 Cole Drive Marin City, California
1966	25	1. Mrs. Annie Mae Plummer 99 Cole Drive Marin City, California
1965	25	1. Mrs. Juanita S. Cobb 31 Burgess Court Marin City, California
1964	25	1. Mr. Leonard L. Turner House 136-A Marin City, California
1963	25	1. Mr. Jesse S. Berry Bldg. C-44, Apt. 348 Marin City, California
1962	25	1. Mr. Theo Barron Marin City, California

Dated, Feb. 24, 1971

/s/ Edmar D. Hicks
Mrs. Edmar D. Hicks

Subscribed and sworn to before me this 24th day of February, 1971.

Seal Francelle Warner

Notary Public for said County and State

My Commission Expires
February 21, 1975

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1180

HUGO A. PINELL, JOHN L. SPAIN, LUIS N. TALAMANTEZ, WILLIE TATE, DAVID JOHNSON, and FLEETA DRUMGO,
Petitioners,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITIONERS' REPLY BRIEF

STATEMENT OF FACTS OCCURRING SUBSEQUENT TO FILING OF PETITION FOR WRIT OF CERTIORARI

Subsequent to the filing of this petition on March 11, 1975, jury selection commenced in the criminal action underlying the instant proceeding. The jury selection phase is not expected to conclude for at least a month from the date of this Reply Brief. The trial itself is thus not expected to commence until some weeks after the conclusion of this Court's current term.

ARGUMENT

I

The trial court below found four groups—Blacks, Latin Americans, blue collar workers, and young people—to be "identifiable" in Marin County. The California Court of Appeal, whose decision respondent asks this Court not to review, specifically upheld this conclusion, saying that "(t)here is evidence to support the trial court's finding of four such classes in Marin."[1] The question of whether a group constitutes a "distinct class" in a particular community is one of fact, and not of law,[2] and this question of fact has been resolved against respondent. The lengthy argument by respondent in this area is thus irrelevant to, and only serves to obfuscate, the real issues raised in this petition for writ of certiorari.

II

The grand jury selectors, as respondent concedes, testified that they neither selected nor attempted to select any Latin Americans for the 1971 Marin County grand jury.[3] Respondent contends, however, that the selectors were justified in ignoring this group because it is relatively small in numbers and, in any event, a

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[1]Petition for Writ of Certiorari, App. A, pp. ii-iii.
[2]*Hernandez v. Texas*, 347 U.S. 475, 478 (1954).
[3]Response in Opposition, p. 32.

challenge to a grand jury cannot properly be based upon the exclusion of a group for only one year.[4]

Such reasoning ignores applicable decisions of this Court. Whatever the exact size of the Marin County Latin American community, the trial court determined that it constituted an "indentifiable" group, and the California Court of Appeal, citing *Hernandez v. Texas, supra,* sustained that finding (see *supra*). The selectors thus had an affirmative duty to "familiarize themselves fairly with the qualifications of the eligible jurors" from that class. *Cassell v. Texas,* 339 U.S. 289 (1950).

This they failed to do, as their own testimony conclusively established (R.T. 1047-48; 1167-68; 1249; 1367). Consequently, it is irrelevant whether there was proof of many years of discrimination (although such evidence was, in fact, introduced (R.T. 1907-08; 1917)):

> "Since the issue must be whether there is discrimination in the selection of the jury that has indicted petitioner, it is enough to have direct evidence based on the statements of the jury commissioners in the very case." *Cassell v. Texas, supra,* 339 U.S., at 290.

Petitioners recognize that they were not entitled to proportional representation on the 1971 grand jury, and therefore do not rest their claim simply upon the fact that no Latin Americans were represented on that particular panel. What petitioners are entitled to, and were denied, is the right to be indicted

[4] *Id.*, at 35-36.

by a grand jury from which a "cognizable" group is not systematically excluded.[5] *Hernandez v. Texas, supra,* 347 U.S., at 482.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue to review the decision of the California Court of Appeal.

Dated, June 3, 1975.

Respectfully submitted,

HOWARD MOORE, JR.,
CHARLES R. GARRY,
BENJAMIN J. DREYFUS,
LYNN S. CARMAN,
Attorneys for Petitioners.

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JOEL KIRSHENBAUM.

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[5]Nor systematically *included.* Respondent has attached to its Response in Opposition the affidavit of Edmar D. Hicks, to support its contention that there was no discrimination against Blacks in prior years. Petitioners would observe that this affidavit is at best irrelevant. The grand jury selectors themselves considered their method of selection to be defective and changed it somewhat for 1971 (R.T. 1027-28; 1122; 1134-35; 1202; 926; 1124). Further, if a close examination of the Hicks affidavit is made, it shows discrimination against Blacks, rather than non-discrimination. For six of the ten years (including five consecutive years) covered by the affidavit, exactly one Black was nominated—a clear case of "systematic inclusion," a practice proscribed by this Court in *Cassell v. Texas, supra.* (In 1969 and 1965, the same person was nominated, Mrs. Juanita S. Cobb, an inconceivable result under a non-discriminatory selection system.) Any selection system which consistently limits the number of persons considered for grand jury service over so long a period of time cannot be found to be non-discriminatory.